No. 83 5145

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SAMPSON ARMSTRONG, PETITIONER

v.

STATE OF FLORIDA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether the governing Florida statute and the trial court's instructions to the jury impermissibly limited the mitigating circumstances that the sentencing authorities could consider in deciding whether to recommend and impose the death penalty.*/

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*/ In addition to petitioner and the State of Florida, Louie L. Wainwright, Secretary, Florida Department of Corrections, and Charles G. Strickland, Jr., Superintendent, Florida State Prison, were parties in the court below.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

SAMPSON ARMSTRONG, PETITIONER

v.

STATE OF FLORIDA, ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner Sampson Armstrong, by his undersigned counsel, petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida in this case.

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida on collateral review (App. A, infra, 1a-12a) are reported at 429 So. 2d 287. The written and oral opinions of the trial court on collateral review (App. C, infra, 14a-35a) are not reported.

The opinion of the Supreme Court of Florida on direct appeal (App. D, infra, 36a-45a) is reported at 399 So.2d 953.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on January 20, 1983. A petition for rehearing was denied on April 28, 1983 (App. B, infra, 13a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. Section 1 of the Fourteenth Amendment states, in pertinent part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

3. The relevant provisions of Florida law, Sections 782.04, 775.082, and 921.141, Florida Statutes, are set forth in Appendix H, infra.

STATEMENT

The Court is already familiar with this case. Petitioner is the co-defendant of Earl Enmund, whose capital sentence this Court reversed last year. Enmund v. Florida, ____ U.S. ____, 102 S. Ct. 3368 (1982). Petitioner's sentence of death should also be reversed, because the sentencing judge and advisory jury lacked the constitutionally required freedom to consider and give independent weight to all relevant mitigating evidence.

On the evening of September 30, 1975, following a jury trial, petitioner and his co-defendant Enmund were

convicted on two counts of first-degree murder and one count of robbery. Immediately thereafter, at approximately 9:00 p.m., the trial court commenced a separate sentencing proceeding before the trial jury.*/ The presentation of evidence by both defendants, counsel's arguments to the jury, and the court's instructions on sentencing were all completed by 9:31 p.m. (Tr. 1438). One half hour later, at 10:02 p.m., the jury recommended that both defendants be sentenced to death (ibid.). The court immediately adopted the jury's recommendation and sentenced both defendants to death on the murder counts (App. E, infra, 46a-47a).

At the time petitioner was sentenced, nearly three years before this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), the governing Florida statute specified seven mitigating circumstances that were to be weighed by judge and jury against any aggravating circumstances that might be found to exist. See Section 921.141(6), Florida Statutes (1982 Supp.) (reproduced in App. H, infra, 120a-121a). The statute directed the jury to determine "[w]hether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist * * *." Section 921.141(2)(b) (emphasis added). The statute further provided that, as a precondition to imposing a sentence of death, the trial court was required to make a written finding that "there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh

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*/ Under Florida procedure, the jury advises the trial judge whether to impose the death penalty. See Fla. Stat. § 921.141(2).

the aggravating circumstances." Section 921.141(3)(b) (emphasis added).*/

In the sentencing proceeding, the court instructed the jury in a manner that tracked the restrictive language of the statute. The jury was told to consider "whether sufficient aggravating circumstances as hereafter enumerated exist to justify the death sentence" (Tr. 1434) (emphasis added). In parallel language, the court instructed the jury to consider "whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist" (Tr. 1434) (emphasis added). The court then listed the eight statutory aggravating circumstances and the seven statutory mitigating circumstances (Tr. 1434-1436). The jury's verdict form was equally specific and limited; it asked "whether sufficient mitigating circumstances defined by the Court's charge do outweigh such aggravating circumstances" (Tr. 1436) (emphasis added).

The court's oral findings**/ further demonstrate its exclusive focus on the mitigating circumstances enumerated by statute (Tr. 1446):

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*/ The italicized phrases in subsections (2)(b) and (3)(b) were eliminated from the statute in 1979. See the revision notes following Section 921.141 (App. H, infra, 121a).

**/ The trial court failed to enter written findings at the time of sentencing, notwithstanding the requirement in Fla. Stat. § 921.141(3). Nineteen months later, in April 1977, under the mandate of the Supreme Court of Florida, the trial judge belatedly entered the required findings, stating that "the defendant was 23 years of age at the time of this offense and this constitutes the only possible mitigating circumstance as to the defendant Armstrong." Armstrong v. State, 399 So.2d 953, 962 (Fla. 1981).

> I find that the [aggravating circumstances found to exist] are not set off by mitigating circumstances, in particular, the age of Defendant, nor do I find from my review of the evidence of the case that the Defendant was acting under duress nor under the substantial domination of another person.

Significantly, the specific mitigating circumstances mentioned and rejected by the judge -- age, duress, and domination by another -- follow directly from the statutory enumeration. See Section 921.141(6)(e), (f), (g).

In March 1981, the Supreme Court of Florida affirmed petitioner's conviction and sentence on direct appeal (App. D, infra, 36a-45a). Chief Justice Sundberg dissented with respect to the sentence of death because of "substantial errors in the aggravating findings" (id. at 44a-45a).*/ Notwithstanding these substantial errors, the court affirmed the death sentence, explaining that the trial court "found that there were no mitigating circumstances" and that, accordingly, the errors "did not impair the process of weighing the aggravating against the mitigating circumstances because there were no mitigating circumstances to weigh." Id. at 43a, 44a.

The trial court's finding of "no mitigating circumstances" is explicable only because the court

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*/ In its oral findings at sentencing and its written findings 19 months later, the trial court specified three aggravating circumstances. It found that the capital felonies: (1) were committed during the course of an armed robbery; (2) were committed for pecuniary gain; and (3) were "especially heinous, atrocious, or cruel." On appeal, the Florida Supreme Court held that only one aggravating circumstance was valid. It held first that "[t]he robbery circumstance and the pecuniary motive" properly constitute only one aggravating circumstance, and second, that "[t]he finding that the murders were especially heinous, atrocious, and cruel cannot be sustained." Id. at 43a.

restricted its own attention and the attention of the jury to the specific mitigating circumstances enumerated in the Florida statute. At the sentencing proceeding, Betty Fine, petitioner's parole officer, testified that petitioner was an epileptic, that he suffered from severe headaches, that he had severe financial problems, that he and his wife, Jeanette Armstrong,*/ had marital difficulties attributable to her infidelity, and that she "on occasion hit him in the head with a bottle and * * * [once] bit him on the side of the face," leaving a scar (Tr. 1417-1420). Fine also testified that petitioner was "substantially dominated by Jeanette Armstrong, by her emotional hold over him" (Tr. 1420).

Only this last item of Fine's testimony was encompassed by the mitigating circumstances enumerated in the statute and listed in the jury instructions. See Section 921.141(6)(e), Florida Statutes, and Tr. 1435. The record shows that the jury and the trial court did not believe themselves entitled to consider, and did not address, any of the other matters mentioned by petitioner's probation officer as mitigating factors to be weighed against the aggravating circumstances found to exist.

Furthermore, because the trial court announced before the sentencing proceedings began that its instructions to the jury would track the statute and would refer only to

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*/ Jeanette Armstrong was indicted together with petitioner and Earl Enmund for first-degree murder and robbery. Her trial was severed, however. She was convicted on two counts of second-degree murder and one count of robbery, and was sentenced to three consecutive life sentences. Enmund v. Florida, 102 S. Ct. 3368, 3370 n.1 (1982).

"mitigating circumstances as defined in the Court's charge" (Tr. 1402; emphasis added), petitioner's trial counsel may well have been discouraged from introducing evidence of additional mitigating factors. These factors include: (1) defendant's low IQ; (2) his minimal amount of schooling; (3) his poor reading and writing ability; (4) his illegitimacy; (5) his poverty; (6) his lack of any adult male supervision at any time in his life; (7) his separation from his mother when he was approximately two years old; (8) his upbringing in the home of his grandmother, where discipline was exceedingly lenient; (9) his regular church attendance in Lake Placid, Florida; (10) his participation as a musician at religious meetings and revivals; and (11) his reputation as a competent and diligent worker.

In sum, the statutory enumeration of mitigating circumstances, the trial court's jury instructions, the jury's verdict form, and the judge's sentencing findings all demonstrate the unconstitutional limitations that restricted consideration of mitigating evidence in this case. The jury was permitted to recommend a sentence of life imprisonment only upon a finding that one or more of the specific mitigating circumstances -- such as age, duress, or domination by another -- enumerated by statute and listed by the court outweighed the aggravating circumstances found to exist.

Following the affirmance of his conviction and sentence on direct appeal and the Governor's denial of clemency, petitioner moved in the trial court for post-conviction relief under Fla. R. Crim. P. 3.850 (App. G, infra, 51a-116a). Among the points raised in the motion

was the question presented in this petition (id. at 63a-67a). The trial court denied relief (App. C, infra, 14a-35a), and the Supreme Court of Florida affirmed (App. A, infra, 1a-12a).

Justice McDonald, joined by Justice Ehrlich, dissented with respect to the question presented here. The dissent stated (App. A, infra, at 10a):

> The record in this case clearly demonstrates that the trial judge limited the jury's consideration of mitigating circumstances to those listed in section 921.141(6), Florida Statutes, and, presumptively, limited his own consideration when he imposed sentence. The judge told the jury to consider mitigating circumstances "as hereinafter enumerated." The only ones enumerated were those listed in the statute.

The dissenters concluded that "the sentence must be vacated and a new sentencing procedure, including a new advisory jury, must be conducted" (id. at 11a). That is the relief petitioner seeks in this Court.

REASONS FOR GRANTING THE PETITION

THE STATUTE AND JURY INSTRUCTIONS UNDER WHICH PETITIONER WAS SENTENCED TO DEATH DEPRIVED THE JUDGE AND JURY OF THE CONSTITUTIONALLY REQUIRED FREEDOM TO CONSIDER AND GIVE INDEPENDENT WEIGHT TO ALL RELEVANT MITIGATING EVIDENCE

Petitioner's sentence of death was imposed in violation of the constitutional principles set forth in Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Those cases held that the sentencing authorities in capital cases must be permitted to consider all relevant mitigating evidence and to weigh it independently of any restrictions that may be imposed by a statutorily prescribed list of mitigating circumstances. As the plurality opinion in Lockett explained (438 U.S. at 604),

individualized sentencing decisions are essential in capital cases, because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."

In this case, the jury and the trial court were improperly limited in their consideration of mitigating evidence. At the time of petitioner's trial in September 1975, the governing Florida statute appeared plainly to limit the mitigating circumstances that could be considered in capital cases to those specified in Section 921.141(6), Florida Statutes. Subsequently, after this Court's decision in Lockett, and three years after petitioner was sentenced to death, the Supreme Court of Florida construed Section 921.141 so as not to restrict the mitigating evidence that the sentencing authorities in capital cases could consider. Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). The court in Songer asserted that its interpretation of state law following Lockett was in fact fully consistent with the way in which the Florida statute had been applied before Lockett. However that may be -- and the decision in Songer is highly dubious both in its statutory construction and its treatment of earlier Florida cases*/ --

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*/ In support of its statutory construction, the court in Songer relied on a slight difference in wording between subsection (5) and subsection (6) of Section 921.141. 365 So.2d at 700 & n.1. Subsection (5) states that "[a]ggravating circumstances shall be limited to the following:" and it then lists the statutory aggravating circumstances. Subsection (6) states that "[m]itigating circumstances shall be the following:" and it then lists the statutory mitigating circumstances. The court in Songer asserted that the omission of the words "limited to" in subsection (6) reflected a legislative intent to permit consideration of mitigating circumstances other than those listed in the statute. This position is diffi-
(Continued)

the fact remains that in this case the trial court proceeded on the assumption that it was limited in the mitigat-

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*/ (Continued)
cult to square with subsections (2) and (3), both of which, before 1979, treated aggravating and mitigating circumstances identically, using the phrase "as hereafter enumerated" to modify mitigating circumstances as well as aggravating circumstances. Moreover, recent research into the legislative history of the Florida death penalty statute demonstrates that the omission of the words "limited to" in subsection (6) was the result not of a deliberate legislative decision to create a distinction between aggravating and mitigating circumstances, but rather of an error in transcription during the legislature's consideration of various bills designed to remedy the constitutional deficiencies identified in Furman v. Georgia, 408 U.S. 238 (1972). See Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 358 & n.199 (1981). See also Journal of the Florida House of Representatives, Special Session 1972, November 29, 1972, at 18, 19; November 30, 1972, at 41-42; December 1, 1972, at 48-52; Journal of the Florida Senate, Special Session 1972, November 30, 1972, at 25; December 1, 1972, at 37, 39-40.

The Songer court's treatment of previous Florida case law was at least as problematical as its statutory construction. Songer asserted that all of the earlier relevant decisions of the Supreme Court of Florida were consistent with the view that the statutory enumeration of mitigating circumstances was not intended to be exclusive. The cases cited in Songer, however, do not support this conclusion. All involved consideration of only the mitigating factors specified in Section 921.141(6). And in Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), the court characterized subsection (6) as a "mandatory limitation" on the mitigating circumstances that could properly be considered by the sentencing authorities in a capital case. The court in Cooper stated that the "Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death sentence * * *, and we are not free to expand the list." Id. at 1139 & n.7.

In 1979, notwithstanding the Songer decision in 1978, the Florida legislature amended Section 921.141 in an effort to comply with Lockett. The words "as hereafter enumerated" were omitted from subsections (2)(b) and (3)(b) to enable the jury and judge in capital cases to weigh mitigating circumstances other than those specified by statute. The relevant legislative materials explained:

(Continued)

ing circumstances it could consider, and it instructed the jury in a way that clearly restricted the jury's attention to the statutorily prescribed list of mitigating circumstances. Whether or not the trial court's approach was consistent with state law in 1975, it was inconsistent with the constitutional requirements described in Lockett and Eddings. Because the jury and the trial court were improperly limited in their consideration of mitigating evidence, petitioner's sentence should be vacated, and a new sentencing proceeding should be conducted.

The trial court instructed the jury to determine "whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist" (Tr. 1434) (emphasis added). This was a clear and unmistakable indication to the jury that it was permitted to consider only the factors listed in Section 921.141(6), Florida Statutes, and repeated in the court's charge.

The trial court here did not merely guide the jury's discretion by directing attention to the statutory mitigating circumstances; the court affirmatively instructed the jury that the statutory list was exclusive and that nonstatutory

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*/ (Continued)
Senate Bill 523 amends s. 921.141(1), Florida Statutes, to bring it in line with the U.S. Supreme Court's reasoning in Lockett, thereby allowing all evidence relevant to the nature of the crime and the character of the defendant to be put before the jury for the purpose of aiding the jury in its deliberations over an appropriate advisory sentence. To this end, Senate Bill 523 eliminates the restriction in subsections (2)(b) and (3)(b) relative to enumerated mitigating circumstances, allowing both the jury and the court to consider the presence of mitigating factors other than those listed in subsection (6).

Senate Staff Analysis and Economic Impact Statement (Florida), May 9, 1979 (revised), at 2.

mitigating circumstances could not properly be considered. Presumptively, the judge limited his own consideration in the same manner when imposing sentence.

This Court has repeatedly emphasized the importance of proper jury instructions to ensure reliable and individualized sentencing determinations in capital cases. Jurek v. Texas, 428 U.S. 262, 271 (1976); Gregg v. Georgia, 428 U.S. 153, 189-192 (1976). The governing standard in reviewing jury instructions is not whether they can conceivably be interpreted in a manner that permits the consideration of nonstatutory factors. An affirmative answer to that question cannot validate a defendant's sentencing. Rather, the law requires remand for resentencing if the trial court's instructions, viewed in their entirety, could have led a reasonable juror to believe that he could consider only the statutory mitigating circumstances. Sandstrom v. Montana, 442 U.S. 510, 514 (1979). By any fair reading of the trial court's instructions, the jury's verdict form, and the trial court's oral and written findings, the sentencing authorities in this case, in September 1975 and April 1977, could have reasonably concluded -- and indeed did conclude -- that they were restricted to the statutory mitigating circumstances in deciding petitioner's sentence.

Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982), is directly on point. As in this case, the trial court's instruction on mitigating circumstances in Washington used "language that almost exactly paralleled that in which the trial court circumscribed the jury's consideration of aggravating factors" and followed "[a]lmost immediately thereafter" (id. at 1370).

The Fifth Circuit held that these instructions created an unmistakable inference: "Unquestionably, a reasonable juror might well infer from this parallel syntax that the enumerated factors -- both aggravating and mitigating -- were the sole factors that he was permitted to consider in the discharge of his oath" (ibid.).

The State in Washington argued that the omission of the word "only" from the instruction regarding mitigating circumstances, as compared with its inclusion in the otherwise otherwise identical instruction regarding aggravating circumstances, would have led a reasonable juror to infer that his consideration of mitigating evidence was not limited to those factors listed by the trial court. A similar argument has been advanced by the State in the present case (see Florida's brief in the court below, at 15), apparently on the ground that the trial court, after instructing the jury to weigh the aggravating circumstances and mitigating circumstances "hereafter enumerated," then prefaced its listing of those circumstances with the following phrases: "Aggravating circumstances are limited by Statute to the following:" (Tr. 1434) and "Mitigating circumstances by Statute are:" (Tr. 1435). The State suggested that the omission of the words "limited to" in connection with mitigating circumstances was sufficient to inform the jury that the court's enumeration of mitigating circumstances was not intended to be exclusive. The answer to this argument is the same as the court of appeals' answer to the State's reliance on the omission of the word "only" in Washington. The Fifth Circuit wrote:

> Perhaps an extraordinarily attentive juror might rationally have drawn such an inference from the omission of this single word. * * * Nonetheless,

> at best the State's argument suggests that there is more than one reasonable interpretation of the crucial language in the charge; this does not mean the charge is not constitutionally infirm, for the Supreme Court has held that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."

655 F.2d at 1370 (quoting from Sandstrom v. Montana, supra, 442 U.S. at 514; emphasis added by the court of appeals).

The conclusion here that the judge and jury were limited in their consideration of mitigating evidence is in no way affected either by defense counsel's proffer of the testimony of Betty Fine as to defendant's background and character or by the trial court's admission of that testimony.* The admission of nonstatutory mitigating evidence cannot avert the harm from an instruction that erroneously limits the jury's consideration.

The court of appeals in Washington v. Watkins, supra, 655 F.2d at 1375, fully endorsed this position, explaining that reliance upon the admission of nonstatutory evidence

> completely miss[es] the point of the Supreme Court's holding in Lockett. Sandra Lockett also introduced evidence of nonstatutory mitigating factors, and also argued their relevance to the sentencer. The fatal flaw in Lockett was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's consideration of that evidence except as it related to the statutory mitigating factors.

Similarly, Eddings v. Oklahoma, supra, supports petitioner's submission. In Eddings, defense counsel also

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* The State did not object to Fine's testimony (Tr. 1416-1417).

introduced nonstatutory mitigating evidence at the sentencing hearing. The trial judge refused to consider the evidence, however, because he interpreted the sentencing statute as precluding its consideration. This Court invalidated the sentence despite the admission of the nonstatutory evidence. "In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf." 455 U.S. at 114. See also Bell v. Ohio, 438 U.S. 637, 641-643 (1978) (death sentence invalid despite introduction of nonstatutory evidence, where sentencing judges believed they were limited to statutory mitigating factors).

In short, Lockett and Eddings would be meaningless if the admission of nonstatutory evidence could render harmless an instruction that improperly restricts the sentencer's consideration to the statutory factors. By relying on the admission of the Fine testimony (App. A, infra, 5a), the Supreme Court of Florida departed from the requirements of Lockett and Eddings. The admission of testimony regarding nonstatutory mitigating factors could be sufficient to overcome an improper limiting instruction only if juries were free to disregard the instructions of the trial judge. Juries are not free to act that way, however. As the court of appeals stated in Washington v. Watkins, supra, 655 F.2d at 1375 (citations omitted),

> Only an instruction from the trial court can invest a particular concept -- here the jury's ability to consider nonstatutory mitigating factors -- with the authority of the court. Indeed, were a jury to consider nonstatutory mitigating factors despite instructions by the court to the effect that it was duty-bound to consider only the two statutory mitigating circumstances, it would be acting "lawlessly."

See Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Roberts v. Louisiana, 428 U.S. 325, 335 (1976).

This Court should grant review because the record establishes that the sentencing authorities in this case lacked the constitutionally required freedom to consider and give independent weight to all relevant mitigating evidence. Petitioner introduced significant mitigating evidence that did not fall within the statutory categories, and there was additional mitigating evidence that could have been introduced had the trial court not indicated in advance that the jury's attention would be limited to the statutory factors. A sentence of death imposed in these circumstances should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 27, 1983

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SAMPSON ARMSTRONG, Petitioner

v.

STATE OF FLORIDA, ET AL.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Sampson Armstrong, by his undersigned counsel, asks leave to file the attached petition for a writ of certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

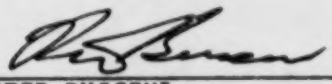
As the attached affidavit of petitioner shows, petitioner has been incarcerated since April 1975. He is currently imprisoned at the Florida State Prison, Starke, Florida. He has no income, no valuable property, and no cash or bank account. He is therefore unable to pay the costs of this proceeding or to give security for those costs.

On May 2, 1975, petitioner was adjudicated an indigent by the Circuit Court of the Tenth Judicial Circuit in and for Hardee County, Florida, and counsel was appointed to defend him at trial. Subsequently, on January 6, 1976, the trial judge found petitioner insolvent and appointed counsel to represent him on direct appeal. During the March 1982 proceedings in the trial court on petitioner's motion for post-conviction relief under Fla. R. Crim. P. 3.850, the trial court again adjudged petitioner indigent and ordered

that all costs of petitioner's appeal be paid by Hardee County, Florida.

For these reasons, the motion to proceed in forma pauperis in this Court should be granted.

Respectfully submitted,



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Dated: July 27, 1983

83 5145

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SAMPSON ARMSTRONG, Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections, et al.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Sampson Armstrong, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present to this Court concern the constitutionality of my conviction and sentence in the Circuit Court of the Tenth Judicial Circuit in and for Hardee County, Florida, and the affirmance of that conviction and sentence in the Supreme Court of Florida.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding on petition for a writ of certiorari in this Court are true.

1. Are you presently employed?

Answer: No, I am not present employed. I was last employed in April 1975. At that time, my average monthly salary and wages were approximately $250.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Answer: No, I have not received any such income.

3. Do you own any cash or checking or savings account?

Answer: No, I do not own any cash or any such account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No, I do not own any such property.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Answer: No persons are dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Sampson Armstrong
Sampson Armstrong

SUBSCRIBED AND SWORN to before me this 15th day of July, 1983.

Bonita G. Howard
Notary Public

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Aug. 24, 1985

Supreme Court of Florida

No. 61,371

SAMPSON ARMSTRONG, Appellant,

vs.

STATE OF FLORIDA, Appellee.

SAMPSON ARMSTRONG, Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections, and
CHARLIE S. STRICKLAND, JR., Superintendent,
Florida State Prison, Respondents.

[January 20, 1983]

PER CURIAM.

Sampson Armstrong appeals the denial of his motion to vacate, set aside or correct his conviction and sentence filed pursuant to Florida Rule of Criminal Procedure 3.850. Armstrong is a prisoner under sentence of death. His convictions and sentences of death were affirmed when he previously appealed them to this Court. Armstrong v. State, 399 So.2d 953 (Fla. 1981). Along with his motion, appellant filed motions for an evidentiary hearing, for a continuance, for appointment and payment of experts, and for discovery. The trial court denied all of appellant's motions. We hold that an evidentiary hearing

is not required and affirm the denial of relief. Armstrong has also filed a petition for habeas corpus in which he argues that he was not afforded effective assistance of counsel on his previous appeal of his convictions and sentences, and in which he argues that this Court, in deciding the appeal, fundamentally erred. We find the contentions to be without merit and deny relief.

I. Rule 3.850 Appeal.

With regard to his convictions for robbery and two counts of first-degree murder, appellant contends that they should be vacated because the court erred in denying his motion for a change of venue; because the court erred in allowing Ida Jean Shaw to testify and to be called as a court's witness; because the jury was not completely apprised of the treatment Ida Jean Shaw received in exchange for her testimony; because the jury was selected from a sample of citizens from which racial and gender-based exclusions had been made; because the court erred in failing to sever the trials of appellant and his codefendant Earl Enmund; and because the trial judge deprived appellant of due process by inhibiting defense counsel in his attempt to present an item of exculpatory evidence. All of these legal points either were or could have been presented to this Court in the initial appeal. They were all either waived at trial by the lack of objection, waived on appeal by the lack of argument here, or presented to this Court, considered, and determined. Thus all of these issues are, for one reason or another, completely foreclosed and are not subject to collateral attack. Antone v. State, 410 So.2d 157 (Fla. 1982); Goode v. State, 403 So.2d 931 (Fla. 1981); Alvord v. State, 396 So.2d 184 (Fla. 1981); Adams v. State, 380 So.2d 423 (Fla. 1980); Henry v. State, 377 So.2d 692 (Fla. 1979).

With regard to his sentence of death, appellant presents numerous arguments questioning its validity. He argues that the sentencing judge considered some improper aggravating circumstances and that, with their exclusion, the sentence of

death is rendered improper. He questions whether the sentencing judge found that his age of 23 at the time of the crimes was in fact a mitigating factor rendering the sentence of death improper. He argues that he was denied due process of law when his sentence of death was not accompanied by written findings of fact as required by statute and that the subsequent filing of written findings did not cure the irregularity. He argues that the trial court, in sentencing him to death, improperly considered and relied upon information other than what was developed at his trial. He argues that the procedure utilized at the sentencing portion of his trial deprived him of due process and provided an inadequate basis for the jury and judge to make their sentencing determinations. He argues that his sentence of death is inappropriate and its imposition is arbitrary and capricious in light of the established facts of the case. He argues that the court committed reversible error in failing to instruct the jury that aggravating circumstances were required to be proven beyond a reasonable doubt.

All of the above-listed contentions either could have been raised on direct appeal, were argued on appeal and determined, or were considered and determined by this Court on its own motion in discharge of its duty to review death sentences. Therefore, they are not subject to consideration by a Rule 3.850 motion. Thompson v. State, 410 So.2d 500 (Fla. 1982); Ford v. State, 407 So.2d 907 (Fla. 1981); Smith v. State, 400 So.2d 956 (Fla. 1981); Weaks v. State, 382 So.2d 673 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979).

Appellant contends that the capital felony sentencing law in effect at the time of the trial and the instructions to the jury regarding sentencing improperly limited mitigating considerations to the circumstances listed in the statute in violation of Lockett v. Ohio, 438 U.S. 586 (1978). This issue, like others already mentioned, could have been raised on direct appeal and therefore is not a proper subject for collateral attack of appellant's sentence. Moreover, we find that the

statute applied, the jury instructions used, and the judge's deliberations in sentence all comported with the principles of Lockett. The instruction did not have the effect of telling the jurors that they were restricted to consideration of statutory mitigating circumstances. This contention, were it a proper one to consider in this proceeding, would be governed by our decision in Peek v. State, 395 So.2d 492 (Fla.), cert. denied, 451 U.S. 964 (1981), in which the same argument was raised. There, we said:

> Returning to the charge given in this case, we note at the outset that it in no way restricts the jury to a consideration of the statutorily enumerated mitigating circumstances. Indeed, the instruction on mitigating circumstances, when read in conjunction with the express limitation on consideration of aggravating circumstances, advises the jury that the list of statutory mitigating factors is not exhaustive. See Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (on rehearing). It strikes a constitutional balance by directing, but not limiting, scrutiny to those areas of mitigation considered vital by the legislature in determining the fairness of a life or death sentence, thereby assuring that the death penalty will be applied in a consistent and rational manner. Were we to sanction an instruction which established no effective guidance for the jury in considering circumstances which may mitigate against death, we would surely breathe life into Mr. Justice Rehnquist's admonition that such a procedure would 'not guide sentencing discretion but [would] totally unleash it.' Lockett v. Ohio, 438 U. S. at 631, 98 S. Ct. at 2978, [illegible] Ed. 2d 973 (Rehnquist, J., concurring in part and dissenting in part).
>
> Contrary to appellant's assertion, the instruction given here is consistent with Lockett v. Ohio. Lockett holds only that a sentencing body must not be precluded from considering, as a mitigating factor, aspects of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. As noted above, our death penalty statute does not limit consideration of mitigating circumstances to those statutorily enumerated. Moreover, unlike the Ohio statute invalidated in Lockett, the mitigating circumstances in Florida's statute direct the jury's attention to many aspects of the defendant's character and the circumstances surrounding the offense. While we do not contend that the statutory mitigating circumstances encompass every element of a defendant's character or culpability, we do maintain that the factors, when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.

395 So.2d at 496-97 (footnotes omitted).

Our conclusion that the jury was not restricted in its consideration of mitigating factors is buttressed by the observation that defense witness Betty Pine was permitted to testify on a broad range of matters at the sentencing trial. The witness testified not only to matters relating to statutory mitigating circumstances, but also to matters concerning appellant's background and character. In view of all the matters she was allowed to testify to, there is no support for appellant's present contention that the court's instructions discouraged defense counsel from attempting to present mitigating evidence. Indeed, judging from the scope of defense counsel's presentation at the sentencing proceeding, it appears that defense counsel correctly interpreted the capital felony sentencing law, which, as we held in Songer v. State, 365 So.2d 696 (Fla. 1978)(on rehearing), cert. denied, 441 U.S. 956 (1979), was not intended to restrict consideration of mitigating factors.

The only contention raised by appellant's motion that is proper for consideration by collateral attack is the argument that he received ineffective assistance of counsel at both the guilt phase and the sentencing phase of his trial. We will therefore proceed to evaluate this claim, using the principles developed in Knight v. State, 394 So.2d 997 (Fla. 1981). We are aware of the different and more elaborate analysis set forth in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982), but we believe the Knight test reaches the legally and constitutionally correct result in this case.

In Knight v. State, this Court expanded upon the principles earlier developed in Meeks v. State, 382 So.2d 673 (Fla. 1980), and announced a four-step test for determining whether a defendant has been denied the effective assistance of counsel at his trial. First, the challenger must detail in his pleading the specific omission or overt act upon which the claim of ineffective assistance of counsel is based. Second, the defendant must show that the act or omission was a substantial and serious deficiency measureably below the standard of

competent counsel. Third, the defendant must show that the deficiency, viewed under the circumstances, probably affected the outcome of the proceedings. Finally, the defendant's showing of substantial, prejudicial deficiency must withstand the state's attempt at rebuttal. Such rebuttal may be achieved by showing beyond a reasonable doubt that there was no prejudice in fact. Knight v. State, 394 So.2d at 1001.

With regard to the guilt phase of the trial, appellant lists several instances of failure to impeach witnesses regarding factual inconsistencies, a failure to object to testimony, and a failure to investigate and present evidence of the alibi defense. With regard to each instance, we have no difficulty finding that the asserted deficiencies were matters of trial tactics within the standard of competence expected of attorneys. Moreover, appellant has made no showing of how the outcome might have been affected by different actions on the part of trial counsel.

With regard to the sentencing phase of his trial, appellant contends that his counsel failed to adequately present evidence of mitigating circumstances. This failure, appellant asserts, is demonstrated by the fact that defense counsel presented only one witness at the sentencing phase, and did not call any members of appellant's family as witnesses. Appellant further asserts that defense counsel failed to submit relevant matters pertaining to his character and background.

Again, we conclude that appellant's arguments are mere attacks upon the tactical choices of his trial attorney. There is no deficiency shown. The lawyer probably did the best that could be done under the circumstances and in fact presented testimony pertaining to a broad range of both statutory and nonstatutory mitigating circumstances.

The trial court order appealed from recites that the record shows that appellant received legal representation at both the guilt and sentencing phases of his trial that was more than adequate and showed above-average competency. The record conclusively shows that there was no failure to provide

reasonably effective assistance of counsel as is constitutionally required.

Appellant also contends that this Court considered information from outside the record in affirming his sentence of death on appeal. This argument does not relate to anything the trial court did or failed to do or to anything that transpired during the trial or trial-level proceedings. Therefore it is not an appropriate matter to raise in a Rule 3.850 motion. Treaster v. State, 430 So.2d 1 (Fla. 1981). However, we will treat this argument as a petition for habeas corpus. We find the argument to be without merit and deny the petition. See Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 102 S.Ct. 341 (1981).

II. Habeas Corpus.

As was stated above, appellant has also filed a petition for a writ of habeas corpus with this Court. In which he challenges this Court's treatment of his prior direct appeal and argues that he was deprived of the effective assistance of counsel in presenting the appeal.

Petitioner contends that this Court committed fundamental error in deciding his appeal and deprived him of due process of law. He argues that the Court erred in affirming his sentence of death after finding that two of the three statutory aggravating circumstances found by the trial judge were erroneous. Our holding was that the erroneous findings in aggravation did not impair the process of weighing the aggravating circumstances against the mitigating circumstances because there were no mitigating circumstances to weigh. Armstrong v. State, 399 So.2d at 963. In view of the fact that the jury recommended death, we held that the single valid aggravating circumstance was a sufficient basis to support affirmance of the sentence of death.

Petitioner argues that our affirmance on this basis was improper since an appellate court cannot know what the sentencing judge would have decided had he known that part of the basis for his decision was invalid. Once this Court had decided that two

of the three aggravating circumstances recited by the trial judge were inapplicable, petitioner argues, the proper result was to then remand for resentencing. In support of this position petitioner cites Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), remanded, 102 S.Ct. 1554 (1982), and Henry v. Wainwright, 661 F.2d 36 (5th Cir. 1981), vacated on other grounds and remanded, 102 S.Ct. 1922, judgment reinstated, 686 F.2d 311 (5th Cir. 1982). However, we find the cited cases to be distinguishable and therefore not controlling. Ford v. Strickland, No. 81-4200 (11th Cir. Jan. 7, 1983). We therefore find this point to be without merit.

Petitioner also contends that he received ineffective assistance of appellate counsel and that because of his appellate lawyer's failings, he was deprived of a full and meaningful appeal of his convictions and sentences. He argues that he should be granted a new or belated appeal. Petitioner presents fifteen points and argues that each constitutes a specific omission, substantially deficient or measurably below the standard of competent counsel, and that each had prejudicial impact on the outcome of the appeal.[1]

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1. The fifteen specific omissions raised by petitioner are:

(a) The failure to appeal the trial court's denial of the motion for change of venue due to prejudicial pretrial publicity;
(b) The failure to appeal the trial court's denial of the motion for severance of the trial from the trial of codefendant Earl Enmund;
(c) The failure to adequately argue that the evidence of guilt was insufficient or weak;
(d) The failure to raise the issue of inadequacy of trial counsel at the guilt phase of the trial;
(e) The failure to argue the issue of discriminatory methods of selection of the jury venire;
(f) The failure to raise the issue of inadequacy of trial counsel at the sentencing phase of the trial;
(g) The failure to argue that the capital felony sentencing statute improperly restricted the consideration of mitigating circumstances;
(h) The failure to invoke the supplemental authority of Lockett v. Ohio, 438 U. S. 586 (1978), during the pendency of the appeal;
(i) The failure to challenge the trial court's

(footnote continued)

We have examined each of the asserted omissions and have found that each of them either (1) is not a specific overt act or omission; (2) is not a substantial and serious deficiency measurably below the standard expected of competent counsel; or (3) is not shown to have been so substantial as to be likely to have affected the outcome of the appeal. See Knight v. State, 394 So.2d 997 (Fla. 1981). We are satisfied that petitioner received a full, fair, and meaningful appeal. We therefore rule that petitioner is not entitled to relief from his convictions or sentences by habeas corpus.

With regard to the appeal of the denial of the Rule 3.850 motion, we hold that the motion, files, and records in the case conclusively show that the appellant is entitled to no relief. We therefore affirm the trial court's denial of appellant's motions. With regard to the petition for habeas corpus, we hold that petitioner is entitled to no relief and deny the motion.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD and OVERTON, JJ., Concur
McDONALD, J., Dissents with an opinion, with which EHRLICH, J., Concurs

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

(con't) findings of aggravating circumstances and to argue concerning the consequences of a holding of invalidity of aggravating circumstances;

(j) The failure to invoke the supplemental authority of Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), during the pendency of the appeal;

(k) The failure to appeal the trial court's omission of an instruction that aggravating circumstances must be proved beyond a reasonable doubt;

(l) The failure to argue that petitioner's single conviction of unarmed breaking and entering of an unoccupied business establishment did not negate the statutory mitigating factor of lack of significant previous criminal history;

(m) The failure to argue that the sentencing proceeding was unfair;

(n) The failure to petition the United States Supreme Court for certiorari to review the affirmance of the convictions and sentences;

(o) The failure to adequately argue that the jury was not fully informed of the agreement between the state and the witness Ida Jean Shaw.

McDONALD, J., dissenting

The record in this case clearly demonstrates that the trial judge limited the jury's consideration of mitigating circumstances to those listed in section 921.141(6), Florida Statutes, and, presumptively, limited his own consideration when he imposed sentence. The judge told the jury to consider mitigating circumstances "as hereinafter enumerated."* The only ones enumerated were those listed in the statute.

Sadly, we failed to note this in our review of this record on appeal, and this defect was not called to our attention until this 3.850 appeal was filed. The error here was an unintentional misinterpretation of section 921.141, Florida Statutes, by the judge and all counsel associated with the case.

This case represents an example of the extreme care that must be exercised in death cases. The death penalty statute enacted by the legislature is an expression of the public policy

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* The preliminary jury charge in the sentencing proceeding is, in part, as follows:

> [I]t is now your duty and responsibility to determine by a majority vote whether or not you advise the imposition of the death penalty based upon, one, whether sufficient aggravating circumstances as hereafter enumerated exist to justify the death penalty; two, whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist . . . .

(Emphasis supplied.)

The trial judge later told the jury:

> Now, you will have two forms of verdict as to each count and as to each defendant. There are two counts of first degree murder. Your advisory sentence as to Count One, and this will be the one as it relates to Earl Enmund: We, the jury, have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the Court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances defined by the Court's charge do outweigh such aggravating circumstances, and we do find and advise that the aggravating circumstances do outweigh the mitigating circumstances. A majority of at least seven of us, therefore, advise the Court that the death penalty should be imposed herein upon the Defendant by the Court as to Count One.

(Emphasis supplied.)

of this State as the appropriate punishment in certain circumstances. We have held it constitutional on numerous occasions. The decision to impose death or life is guided by the mandatory finding of at least one aggravating factor as defined by the statute. Against the aggravating factors found beyond a reasonable doubt, mitigating circumstances as defined by statute and other evidence which assists the jury to determine the character of the offender are weighed so that the jury members in recommending and the judge in imposing have had their discretion carefully guided. Judges and juries must not be precluded from considering nonstatutory mitigating circumstances. Lockett v. Ohio, 438 U.S. 586 (1978). The legislature defined certain factors to be considered in mitigation. That legislative list of mitigating circumstances is neither exclusive nor all inclusive. In Songer v. State, 365 So.2d 696 Fla. (1978), cert. denied, 44 U.S. 956 (1979), we emphasized that it has always been proper under the Florida statute to consider nonstatutory mitigating circumstances. We must be true to that holding and be sure in all cases that the jury was not precluded from so considering them.

The United States Supreme Court recently reaffirmed the importance of a judge and jury's consideration of all factors regarding a defendant and his commission of the crime before imposing the death sentence. Eddings v. Oklahoma, 102 S.Ct. 869 (1982). Florida's death penalty can be constitutionally applied, but to do so we must be alert to those cases where the full complement of due process rights has been impinged upon. This is such a case as it relates to the sentencing. There was no ineffective assistance of counsel in this case, but a lack of due process in the sentencing phase. There is no basis to again review the conviction, but the sentence must be vacated and a new sentencing procedure, including a new advisory jury, must be conducted.

ERVLICH, J., Concurs

An Appeal from the Circuit Court in and for Hardee County,

William A. Morris, Jr., Judge - Case No. 75-113,

and An Original Proceeding - Habeas Corpus

Robert Young, Winter Haven, Florida; and Peter Buscemi of Paul, Weiss, Rifkind, Wharton and Garrison, Washington, D.C.,

for Appellant/Petitioner

Jim Smith, Attorney General and Michael A. Palecki, Assistant Attorney General, Tampa, Florida,

for Appellee/Respondents

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

THURSDAY, APRIL 28, 1983

SAMPSON ARMSTRONG, Appellant, vs. STATE OF FLORIDA, Appellee.	**	CASE NO. 61,871 Circuit Court Case No. 75-110 (Hardee)
SAMPSON ARMSTRONG, Petitioner, vs. LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, and CHARLES G. STRICKLAND, JR., Superintendent, Florida State Prison, Respondents.	**	

On consideration of the Motion for Rehearing filed by attorneys for appellant-petitioner,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD and OVERTON, JJ., Concur
McDONALD and EHRLICH, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux

cc: Hon. Coleman W. Best, Clerk
Hon. William A. Norris, Jr., Judge

Peter Buscemi, Esquire
of Paul, Weiss, Rifkind, Wharton & Garrison
Robert Young, Esquire
of Wilkins, Moorman & Young
Robert Krauss, Esquire
Michael A. Palecki, Esquire

APPENDIX C

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff, -vs- SAMPSON ARMSTRONG, Defendant.	)	CRIMINAL ACTION CASE NO. 75-110

AMENDED ORDER DENYING MOTION TO VACATE, SET ASIDE, OR CORRECT CONVICTION AND SENTENCE

On September 30, 1975, Sampson Armstrong was convicted of the first degree murder of Thomas and Eunice Kersey. The death penalty was imposed following the recommendation of the trial jury.

The judgment and sentence was subsequently affirmed by the Florida Supreme Court on March 26, 1981, and rehearing was denied on June 15, 1981. Armstrong v. State, 339 So.2d 953 (Fla. 1981).

Governor Graham signed the death warrant on March 4, 1982, setting the date of execution during the seven (7) days beginning Thursday, March 24, 1982.

At approximately 4:00 P.M. on Monday, March 22, 1982, counsel for Armstrong delivered to the court a motion for post conviction relief and for a stay of execution, together with other motions. Hearings on these motions were commenced in Wauchula at 10:30 A.M. on Tuesday, March 23, 1982. The defendant, Armstrong, was represented by Mr. Robert Young of Winter Haven and Mr. Peter Buscemi of the Washington D.C. law firm of Paul, Weiss, Rifkind, Wharton and Garrison. The State was represented by Michael Palecki and Don Wilcox.

Overnight I read the entire transcript of all pre-trial, trial, and post-trial proceedings, these consisting of fourteen (14) volumes and three court files. At approximately 10:30 A.M. on Wednesday, March 24, 1982, I reconvened court and orally announced my ruling to deny the motion for post conviction relief and to deny the motion for stay of execution. A brief

order was signed in order to expedite further action. This order supplements that order.

Considering each issue raised in the motion for post conviction relief, the court rules as follows:

1) I-A- denied. This issue should have, or would have been raised on direct appeal. Thompson v. State, _____ So.2d _____ (Fla. case number 61,164, opinion filed February 11, 1982); Ford v. State, _____ So.2d _____ (Fla. case number 61,440, opinion filed December 4, 1981); Goode v. State, 403 So.2d 931 (Fla. 1981). Further, defendant failed to object to the jury instructions at trial (transcript attached). Clark v. State, 363 So.2d 331 (Fla. 1978).

2) I-B- denied. This issue represents an impermissible attack on the decision of the Florida Supreme Court in Armstrong v. State, 399 So.2d 953 (Fla. 1981).

3) I-D- denied for the reason set forth in paragraph 2 above.

4) I-C- denied. This issue was raised on direct appeal in Armstrong v. State, supra. The Florida Supreme Court did not misconstrue the trial court's findings and the trial court did, in fact, find that the age of Sampson Armstrong was not a mitigating factor.

5) I-E- denied. This issue is not an appropriate ground for post conviction relief. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); Foster v. State, 400 So.2d, 1, 4 (Fla. 1981).

6) I-F- denied. This specific issue was raised on direct appeal and ruled on adversely to defendant. 399 So.2d 958, 960 (Fla. 1981). The Court again reaffirms its prior written statement to the Florida Supreme Court that in imposing the death penalty, this court did not consider any matters outside the record in this cause.

7) I-G- denied This ground is without merit when the transcript of the entire penalty phase of the trial is reviewed. (Transcript attached).

8) I-H- denied. The court's reasoning regarding the allegation of ineffective assistance of counsel at the sentencing proceeding is set out in detail in another section of this order.

9) I-I- denied. A review of the entire transcript leads to the conclusion that the evidence abundantly supports the defendant's conviction. This conclusion was also reached by the Florida Supreme Court on direct appeal.

As to the trial of Jeanette Armstrong, the undersigned also presided over that trial. The evidence at that trial was sufficient, beyond a reasonable doubt, to support her conviction of first degree murder. There is no logical explanation for her conviction of second degree murder.

10) I-J- denied. This issue could have been raised on direct appeal. It was not raised during trial.

11) II-A- denied See reasons set forth in paragraph 2 above.

12) II-B- denied. This issue was presented to the Florida Supreme Court on direct appeal with a ruling adverse to defendant. Armstrong, supra.

13) II-C- denied. This issue was presented to the Florida Supreme Court on direct appeal with a ruling adverse to defendant. Armstrong, supra.

14) II-D- denied. See reasons set forth in paragraph 2 above.

15) II-E- denied. This issue was not raised at trial and the naked allegations in the motion are insufficient.

16) II-F- denied. The Court's reasoning will be set forth in a later section.

17) II-G- denied. See reasons set forth in paragraph 2 above

18) II-H- denied. See reasons set forth in paragraph 2 above.

INEFFECTIVE ASSISTANCE
OF COUNSEL AT GUILT
AND PENALTY PHASE OF
TRIAL

These [illegible] post conviction relief. Denied, and motion for evidentiary hearing thereon also denied.

Now, as to the [illegible] Assistance, it is important to put this matter in proper context, that is the year, 1975. In May 1975, three people were indicted by the Grand Jury of Hardee County for first degree murder. Three separate attorneys appeared in connection with each of the three defendants. Mr. Frank Oberhauser, who had a reputation of skill and aggressiveness as a trial attorney, Mr. Michael Trombley, an experienced trial attorney, representing Earl Enmund, and Jon Anderson, who had been retained by Sampson Armstrong's mother to represent his interests in this trial. Although new to the practice, Mr. Anderson had already gained a reputation among his colleagues, and among the members of the Bench, as having a reputation for legal scholarship, aggressiveness, integrity and professionalism. His current stature as a member of one of the leading trial firms in Polk County indicates that this early reputation was well deserved. Neither Mr. Trombley nor Mr. Anderson resided in Hardee County.

This matter was tried in 1975. It was the first capital case set for trial in this County since Furman v. Georgia.

The State Attorney's office, through Mr. Wilcox, was represented by a young attorney who had not tried a capital case. Neither had the trial Judge.

A review of what Mr. Anderson did in connection with the discharge of his professional responsibilities reveal the following: He made his initial appearance in this Court on the 30th of June, 1975; he thereafter filed a Motion for Discovery on the 30th of June, 1975; he filed a Motion for Change of Venue on the 11th of July, 1975; a hearing on that Motion was held on the 15th of July, 1975; he filed a Notice of Alibi on the 21st of July; he thereafter took depositions or noticed depositions for the principle State's witness in particular, Willie Lee, J. B. Neal, and Ida Jean Shaw; he filed an addendum to his Motion for Change of Venue on the 25th of July attaching

directed to certain photographs and other items of tangible and physical evidence; on the 29th of July he filed a Motion to Sever his client from the trial of Jeanette Armstrong and Earl Barnett; on the 30th of August, 1975, he filed a Motion to Exclude the Testimony of J. B. Neal on the grounds that J. B. Neal had been unavailable to him for the purpose of deposition; on the 8th of August he filed a Motion to Supress the admission, or alleged admissions of Sampson Armstrong; on the 8th of August he filed another Motion to Compel Discovery as it related to the defense of alibi; on the 8th of August he filed a request for a list of the potential jurors; he took depositions of J. B. Neal on the 11th of August, 1975, which consisted of 70 pages of testimony; he took the deposition of Gordon Goodson on the 29th of August; on the 15th of September, after the trial of Jeanette Armstrong, he made a further addendum to the Motion for Change of Venue; he attended the entire trial of Jeanette Armstrong; on the 15th of September he filed another renewed Motion for Severance; he submitted to the Court a request for special Jury instructions, two involving circumstantial evidence, one involving aliti, one involving reasonable doubt, one involving presumption of innocence, one involving accomplices and co-conspirators, one involving immunity or reward, and another involving credibility of witnesses; he submitted to the Court questions to be asked of the Court's witness, Ida Jean Shaw.

Following the rendition of the verdict, he filed a Motion for new trial on the 6th of October, 1975; a Notice of Appeal on the 9th of December, 1975; Directions to the Clerk, and Motion for Order of Insolvency on December 29th, and Assignments of Error on January 17, 1976.

I call attention to the various assignments of error (attached hereto) that this allegedly incompetent trial counsel filed and their striking similarity to many of the allegations in the motion for post-conviction relief now before the Court.

I have reviewed very carefully the entire trial of this Defendant, and I find that during the course of the trial Mr. Anderson renewed all of the Motions upon which he had received a ruling adverse to his client. He vigorously argued the Motion for Change of Venue; he was successful in supressing the testimony of Jeanette Armstrong as it might apply to his client; he was successful in suppressing alleged admissions or statements of Sampson Armstrong; that in the cross examination of the witness, Ida Jean Shaw, beginning on page

statements and [illegible] statements [illegible] in any way connected with this trial [illegible] the Court's question [illegible] had been granted immunity; he was [illegible] vigorous in his cross-examination [illegible] that witness J. B. Neal.

During trial there was an attempt by the State of Florida, which introduce, through the testimony of Sheriff Murdock, certain statements or admissions that were made by Sampson Armstrong, and upon objection of Mr. Anderson, the State Attorney's Office withdrew their proffer of that testimony. In his opening statement to the Jury, he repeatedly called the Jury's attention to the inconsistencies and inaccuracies in the testimony of the witnesses, Ida Jean Shaw and J. B. Neal, as he did in his concise closing argument to the Jury.

I further find that at the time of the penalty portion of the trial he did present a witness on behalf of his client, and the record reflects that the Court specifically directed a question to the Defendant, Sampson Armstrong, as to whether he intended or wished to take the stand in the penalty portion of his trial, to which the Defendant, through counsel, answered in the negative.

At page 1127 of the trial transcript the following took place after the Jury was selected: "The Court: I want to put this on the record please. I think the record should reflect my appreciation to counsel and to the court personell, our Bailiff, our clerk, and our Court Reporter, for the very professional way this Jury was selected, and the manner in which each of you discharged your responsibilities toward your clients and toward the Court. You have my appreciation for the very professional manner in which you discharged your responsibilities."

Thereafter at page 1817 of the trial transcript, after the Court had been advised that the Jury had reached a verdict in the trial phase of the case and before we knew what it was, I convened the court and the following took place: "The Court; Bring the Jury back. Just a minute. First of all, Counsel, I have been advised that the Jury has reached a verdict. Of course we at this point in time do not know what this verdict is, but I do want to say as a part of this record, both to the State and to each of you, that I appreciate the manner in which you have approached this trial of this case and the professional manner in which each of you and all three of you have discharged your responsibilities to your clients and to the State."

Accordingly, as to the issue of ineffective assistance of counsel, after having reviewed the entire transcript of this matter, as did each member of the Florida Supreme Court, I find that there is absolutely no necessity to hold an evidentiary hearing and that the allegations are not supported by the record and are without merit. Knight v. State 394 So.2d 997 (Fla. 1981)

CONCLUSION

The procedural posture of this case [illegible] in the Court's opinion, the very [illegible] of orderly judicial process [illegible] issues presented today and yesterday were ripe for consideration in a timely fashion after June 15, 1981.

No more awesome responsibility can ever come to any person than to impose a death sentence on another person. I become concerned as I perceive a feeling on behalf of certain Federal Judges and Counsel who represent death penalty defendants seeking post-conviction relief that for some reason State Trial Judges are unmindful of the awesome burden we have under the law. I note that this burden is not incumbent upon the Federal Judiciary, but is upon State Trial Judges. If one thing was brought home to me as I reviewed this entire transcript and went back in my mind to 1975, and I feel confident it was in the minds of the Justices of the Florida Supreme Court as they reviewed every page of this transcript, it was that the Court, the State Attorney's Office, and Defense Counsel, together, made every effort to ensure that the Constitutional rights of the defendants, Earl Enmund and Sampson Armstrong were protected. I felt that way in 1975, and feel that way today.

I vividly recall driving home to Polk County after this case was completed. It was a dark, rainy, foggy night. Just a little north of Bowling Green I pulled off on the right of the road and sat for over forty-five minutes unable to continue because I had just finished looking another human being directly in the eye and saying ".... you are to be put to death by electrocution. And may God have mercy on your soul."

Sampson Armstrong was afforded a fair and impartial trial by a jury of his peers. He was represented by competent and effective counsel. He is guilty as charged, beyond a reasonable doubt. The imposition of the death penalty is appropriate. He is entitled to no relief.

Accordingly, all motions not heretofore ruled on are DENIED.

DONE AND ORDERED at Wauchula, Hardee County, Florida, this

24th day of March, 1982.

William A. Norris, Jr., Circuit Judge

(Thereupon, with the Defendant present, the following proceedings were had:)

THE COURT: Gentlemen, are there other matters that we need to take up you wish to be heard before the Court announces its rulings on the pending matters?

MR. BUSCEMI: Your Honor, I don't think there are any additional matters. The only thing I want to add to what I said yesterday, I neglected to point out in connection with the first argument, the Lockett point, the Statute has been amended since the Lockett decision. I think as an additional factor that ought to be mentioned in support of our arguments, that the Statute at the time of trial did not coincide with the Constitutional requirements outlined by the Court in Lockett.

THE COURT: Thank you.

From the State?

MR. WILCOX: No further argument.

I would like, if the record hasn't already reflected, it would reflected that Armstrong has been present at all times during all proceedings.

THE COURT: Well, I make no apology to anyone by virtue of the lateness in reconvening this hearing. I took the trial transcript home with me last

night and was up until 4:00 o'clock this morning reading it. I didn't complete my review of that transcript until I came down here this morning. I have now read every word of every recorded proceeding in connection with this case, and in addition have reviewed every document in the court file. So I am tired. When I am tired I sometimes have a tendency to ramble. But I am going to orally announce my rulings which will then be subsequently today reduced to writing before I leave Wauchula. Should there be any variance between what I say now and the written word, the writte word shall prevail.

Now, the undisposed matters are as follows: Defendant's Point 1-A will be denied; 1-B and 1-F will be denied.

Now, I want to take 1-H and 2-F relating to ineffective assistance of counsel.

It is my view that this case, together with almost every case that has resulted in a conviction and a sentence of death in the State of Florida, affirmance by the Supreme Court and denial of executive clemency, the issuance of the death warrant, and after that point, then the flood of motions for post-conviction relief after the death warrant has been issued and the date of execution set, is purely an efferant to an ordered system of justice in this country. It makes a mockery, in my

view, of what people, the public and everyone else should expect from a legal system.

Perhaps the only difference I see in this case is the fact that the Supreme Court's affirmance of this man's conviction was not finalized until June of 1981. Nonetheless, from June of 1981 until yesterday's date, every issue that could have been raised was ripe to be raised but it was not done so. So it puts the Court in the position of receiving the motions that were set for hearing in late afternoon Monday, holding a hearing on Tuesday, staying up most of the night on Tuesday to review the record, coming into court to have to announce orally the Court's decision, having before the Court handwritten responses from the State, they not even having had an opportunity to reduce them to typewritten form, faced personally with the Defendant in court who could be legally executed tomorrow and the Court being put in the position of having to rule on some substantial matters.

I want to talk about the ineffective assistance of counsel question.

Certainly I am not a stranger to these types of proceedings. In order, I hope, to build some sort of record for further, what I'm sure will be jurisdiction involvement in this case, let me first address the question of competency of counsel at this proceeding.

The Court specifically finds that the Defendant, Sampson Armstrong, was represented by competent and effective counsel in this post-conviction proceeding.

Now, as to the trial of Sampson Armstrong, I believe it is important to put this matter in proper context, and that is in the year of 1975.

In 1975, I believe it was in May, three people were indicted by the Grand Jury of Hardee County, charged with the offense of first degree murder. There was a conflict involving the possible appointment of the Public Defender's Office and subsequently three separate private attorneys appeared in connection with the three Defendants: Mr. Frank Oberhousen, who does not reside in Hardee County, who the Court notes had at that time a reputation of a skilled trial attorney; Mr. Michael Trombley representing Earl Enmund, an experienced trial attorney; and Jon Anderson who had been retained by Sampson Armstrong's mother to represent his interests in this trial. Although new to practice, Mr. Anderson had already gained a reputation among his colleagues and among the members of the Bench as having a reputation for legal scholarship, aggressiveness and integrity and professionalism. His current stature as a member of one of the leading trial firms in Polk County indicates that reputation was well deserved.

Neither Mr. Trombley nor Mr. Anderson resided in Hardee County.

Now, this matter was tried in 1975. It was the first capital case set for trial in this county in, I suppose, fifteen or twenty years.

The State Attorney's Office through Mr. Wilcox was represented in this matter by, again, a young attorney in the practice who had not tried a capital case before. Neither had the trial Judge.

If you go back and review just exactly what Mr. Anderson did in connection with the discharge of his professional responsibility you will find the following:

He made his initial appearance in this court on the 30th of June, 1975.

He thereafter filed a motion for discovery on the 30th of June, 1975. He filed a motion for change of venue on the 11th of July, 1975. And a hearing on that motion was held on the 15th of July.

He filed a notice of alibi on the 21st of July.

He thereafter took depositions or noticed depositions for the principal State's witnesses, in particular, Willie Lee, J. B. Neal and Ida Jean Shaw.

He filed an addendum to his motion for

change of venue on the 25th of July attaching thereto the results of a public opinion survey that he had commissioned. On the 25th of July he filed a motion to suppress the confession of Jeanette Armstrong. On the 25th of July he filed a motion in limini directed to certain photographs and other items of tangible physical evidence.

On the 29th of July he filed a motion to sever his client from the trial of Jeanette Armstrong and also Earl Enmund.

On the 8th of August, 1975, he filed a motion to exclude the testimony of J. B. Neal on the grounds that J. B. Neal had been unavailable to him for the purpose of deposition. On the 8th of August he filed a motion to suppress the admission or alleged admission of Sampson Armstrong. On the 8th of August he filed another motion to compel discovery as it related to his defense of alibi. On the 8th of August he filed a request for a list of the potential jurors.

He took the deposition of J. B. Neal on the 11th of August, 1975, which consisted of seventy pages of testimony. He took the deposition of Gordon Goodson on the 29th of August. On the 15th of September he made a further addendum to the motion for change of venue after the trial of Jeanette Armstrong.

And by way of comment, this Court's

recollection, which I confirmed, was that at the trial of Jeanette Armstrong the Court had granted the motion for severance. Mr. Anderson was in attendance at that trial each day of the trial and through the rendition of the verdict of the jury.

On the 15th of September he filed another renewed motion for severance. He submitted to the Court a request in accordance with the Court's request for special jury instructions, two involving circumstantial evidence, one involving alibi, one involving reasonable doubt, one involving presumption of innocence, one involving accomplices and co-conspirators, one involving immunity or reward, another involving credibility of witnesses. In accordance with the request from the Court he also submitted to the Court questions to be asked of the Court's witness, Ida Jean Shaw. He participated actively during the course of the trial, which I will allude to further in just a moment.

Following the rendition of the verdict he filed a motion for new trial on the 6th of October of 1975, a notice of appeal on the 9th of December, 1975, directions to the Clerk, motion for order of insolvency on the 29th of December, and assignments of error on January 17, 1976.

And I call everyone's attention to the

various assignments of error that this allegedly incompetent trial counsel filed and the striking similarity to the assignments of error and to the motion for post-conviction relief that is now before the Court as it relates to both the guilt and the penalty phase of this trial.

I have reviewed very carefully the trial of this Defendant and I find that during the course of the trial Mr. Anderson renewed all of the motions that he had heretofore made that the Court had ruled adversely to his client, that he was successful in the Court suppressing alleged admission or statement of Sampson Armstrong, that in the cross examination of the witness Ida Jean Shew beginning on page 1389 of the trial transcript and lasting to and including page 1431, that he was vigorously and aggressively attempting to point out the inconsistencies of her statements and the prior inconsistent statements to the various people connected with this trial and bringing to the jury's attention that she had been granted immunity, that he was vigorous in his cross examination of the witness Willie Lee, that as to the witness J. B. Neal his cross examination, found on page 1529 through 1538 of the trial transcript, shows a vigorous cross examination and attempt to impeach the credibility of that witness.

Thereafter there was an attempt on the part

of the State of Florida to again introduce through the testimony of Sheriff Murdock certain statement or admissions that were made by Sampson Armstrong, and upon the objection of Mr. Anderson the State Attorney's Office withdrew that proffer of that testimony, that in his opening statement to the jury, in his portion of the defense, he repeatedly called the jury's attention to the inconsistencies and inaccuracies of the witnesses Ida Jean Shaw and J. B. Neal as he did in his lengthy, or rather lengthy closing argument to the jury.

I further find that at the time of the penalty portion of the trial he did present the witness on behalf of his client, and the record reflects that the Court specifically directed a question to the Defendant, Sampson Armstrong, as to whether he intended or wished to take the stand at the penalty portion of his trial to which the Defendant through counsel answered in the negative.

So, as to the question of incompetent counsel or ineffective assistance of counsel at both the penalty and the trial phase, after having reviewed the entire transcript of this matter, as did the Florida Supreme Court and each Justice that heard this case, I find that there is absolutely no necessity to hold an evidentiary hearing and that the allegations of ineffective

assistance of counsel are not supported by the record and will accordingly be denied.

That leaves us with the question of whether a stay of execution should be granted.

No more awesome responsibility can ever come to any person than to impose the death penalty or death sentence on another person.

I become concerned as sometimes I perceive a feeling on behalf of certain Federal judges and counsel who are representing the defendant seeking post-conviction relief, there is a feeling on their behalf that for some reason the State Court judges are unmindful of the awesome burden that we have under the law. I know that burden is not incumbent upon the Federal judiciary but it is upon the State trial court judges.

If one thing was brought home to me as I reviewed this transcript and went back in my mind to 1975, and I feel confident it was in the minds of the Justices of the Florida Supreme Court as they reviewed every page of this transcript, as did I, that the Court, the State Attorney's Office and the Defense counsel together made every reasonable effort, every conceivable effort to insure that the Constitutional rights of the Defendants, Earl Enmund and Sampson Armstrong, were protected. I felt that way in 1975; I feel that way today.

Again, as it relates to the assistance of counsel, at page 1127 of the trial transcript the following took place after the jury was selected:

"The Court: I want to put this on the record, please. I think the record should reflect my appreciation to counsel and to the court personnel, our Bailiff, our Clerk and our Court Reporter for the very professional way the jury was selected and the manner in which each of you discharged your responsibilities toward your clients and toward the Court. You have my appreciation for the very professional manner in which you discharged your responsibilities."

Thereafter at page 1317 of the trial transcript, after the Court had been advised that the jury had reached a verdict in the trial phase of the case and before we knew what it was, I convened the court and the following took place:

"The Court: Bring the jury back. Just a minute. First of all, counsel, I have been advised the jury has reached a verdict. Of course, we at this point in time do not know what this verdict is. But I do want to say as a part of this record both to the State and to each of you that I appreciate the manner in which you have approached the trial of this case and the professional manner in which each of you and all three of you have

discharged your responsibilities to your clients and to the State."

Thereafter the penalty phase of this trial began and it became my responsibility thereafter to determine if the death penalty should be imposed.

I felt then in 1975, I felt in 1977 when I entered my written findings of fact in accordance with the mandate of the Supreme Court, and I feel today that this Defendant was afforded a fair and impartial trial by a jury of his peers, that he was afforded adequate competent legal counsel, that he was guilty of the charge, a charge of murder in the first degree, beyond and to the exclusion of every reasonable doubt. I concurred then in the recommendation of the jury. I concurred in that recommendation in 1977 and I concur in it today and I concur in it as interpreted by the Florida Supreme Court in the opinions that they filed in this case.

As I have said, there is no greater responsibility that any man will ever have than to impose the death penalty on another person. And I vividly recall driving home to Polk County after this case was completed, it was a dark, rainy, foggy night, and just a little bit north of Bowling Green I pulled off to the side of the road and sat there for a period of over forty-five minutes because I had just finished looking another human being in

the eye and saying that you are going to be put to death by electrocution, may God have mercy on your soul.

I find no justification for issuing a stay of execution. I want the record to be clear I am ruling on this. I am specifically ruling that I do have the power and the authority to grant a stay of execution. I find that a stay of execution is not justified under the law and facts of this case.

Gentlemen, I intend to reduce everything that I have said to writing today and file that with the Court.

MR. YOUNG: Your Honor, we have some papers to file with the Clerk, if we may, prior to that.

THE COURT: All right.

MR. YOUNG: Prior to that, and it may be premature, but I think with the Court's permission we would do it now but not later because of the exigency of the situation.

MR. BUSCEMI: We have prepared a number of orders for the Court to sign and we think they do embody the Court's ruling that you have just announced.

The first order is an order denying the motion for post-conviction relief and granting the motion that the Defendant can proceed as an indigent.

MR. YOUNG: In connection with that, I

Sampson ARMSTRONG, Appellant,

v.

STATE of Florida, Appellee.

No. 48516.

Supreme Court of Florida.

March 26, 1981.

As Corrected on Denial of Rehearing June 15, 1981.

Robert E. Pyle, Lake Alfred, for appellant.

Jim Smith, Atty. Gen., and George R. Georgieff and Donald K. Rudser, and Lawrence A. Kaden, Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of conviction on two counts of murder in the first degree and one count of robbery. The Circuit Court of the Tenth Judicial Circuit, in and for Hardee County, sentenced appellant Sampson Armstrong to death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const.

The appellant and co-defendant Earl Enmund were tried together and convicted of the first-degree murders and robbery of Thomas and Eunice Kersey. After returning verdicts of guilt the trial jury heard evidence on the issue of sentence pursuant to section 921.141, Florida Statutes (1975), and recommended the death penalty for both defendants. The trial court imposed sentences of death on Armstrong for the two counts of first-degree murder and a sentence of life imprisonment for the crime of robbery. We affirm his convictions and sentences of death.

I. Facts

On April 1, 1975, at about eight o'clock, a. m., the bodies of Thomas and Eunice Kersey were discovered by their daughter in their rural Hardee County home, located on state highway 62 between Fort Green to the west and Wauchula to the east. Mr. and Mrs. Kersey, aged eighty-six and seventy-four respectively, had been shot to death. Some of the evidence constituting the state's case in the trial court consisted of physical items recovered at the scene and examined in the course of investigation. The bodies were found on the kitchen floor, near the back door of the home. There was a quantity of blood on the floor, some five feet away from where the bodies were lying, that prompted the authorities to investigate the possibility that one of the perpetrators was wounded during the attack. Later that morning, police found Jeanette Armstrong, the wife of appellant Sampson Armstrong, being treated for a gunshot wound in a hospital in nearby Avon Park, in Highlands County. The blood recovered at the scene proved to be of a different type from either of the Kerseys' blood, and to match the blood type of Jeanette Armstrong.

On the ground outside the house, investigators found a plastic jug filled with water.

There were four firearm projectiles found at the scene. One was on the ground outside the house, one in the door jamb of the back door, one in the water heater in the kitchen of the house, and one on the floor, under the body of Mrs. Kersey. Mrs. Kersey was shot six times in all, with three of the wounds being superficial so that three of the bullets exited the body. Three bullets remained in her body and were recovered. The three bullets found in the body all entered the body in the right side and passed downward.

Mr. Kersey was shot twice. One bullet entered his right arm and passed on through his heart to the left side of his body. The other entered his chest from directly in front. Both bullets were recovered. The bullet that entered from the right side had a slight downward angle. The one that entered the front of the chest was almost straight in its path from front to back. According to expert firearms identification testimony, one of the bullets recovered was a .38 caliber and the other was a .22 caliber. The .38 caliber bullet from the body of Mr. Kersey, a .38 caliber

bullet from the body of Mrs. Kersey, and the .38 caliber bullet found in the kitchen door jamb, were all fired from the same weapon. The .22 caliber bullet found in the body of Mr. Kersey and a .22 caliber bullet from Mrs. Kersey were both fired from the same gun.

The pathologist who testified at trial told the court and the jury that when a bullet enters the body, it can be deflected in numerous ways, so that it is difficult to tell of the angle of fire from the path of the bullet. With regard to the specific question of reconstructing the position of Mrs. Kersey when she was shot, based on the paths of the bullets, the pathologist testified, "Well, there are all sorts of possibilities . . . There is really no way that I could determine what position her body was in when she was shot. . . . [S]he was shot from below, above, and behind." None of the entrance wounds on either of the bodies was inflicted from a range of closer than several feet away.

The state presented the testimony of a witness who drove by the Kersey home between 7:30 and 7:40 a. m. on the day the bodies were found. When she passed the Kersey home, she saw on the side of the road a large, cream-colored car with a license tag bearing the prefix number 18. There was a black man in the car. Another witness for the state drove by the house at 7:35 that morning and saw a car parked beside the road about two hundred yards west of the house. It was a large, yellow car with a dark colored top. There was one person in the car.

The state's evidence also included the testimony of two of the Kerseys' neighbors. One testified that on April 1st he was at work on his own land only two or three hundred yards from the Kerseys' house when, at about 7:45 a. m., he heard from six to fifteen shots of gun fire and some high-pitched screaming. The other neighbor said that he lived only two hundred yards west of the Kerseys, and that between 7:30 and 8:00 o'clock that morning he heard about seven loud sounds. He would have thought that they were caused by Mr. Kersey hammering to separate some scrap metal, except for their irregular sequence. From the sounds he remembered, he concluded that they also could have been gunfire.

A neighbor of the appellant also testified for the state. He said he lived about three-fourths of a mile from Enmund's home, and that they both lived on a road that runs off of New York Avenue south of the town of Wauchula. This witness testified that on the morning of April 1st, at about 6:30 he was standing out beside the road, New York Avenue, that goes into Wauchula to the north. He was waiting for a ride that was to take him to another town on personal business. The person who was to meet him there did not come that morning, but he was still standing there waiting for him after 8:00 o'clock. The witness said that at approximately 6:30 or 6:45, he saw co-defendant Earl Enmund and his former common-law wife Ida Jean Shaw in their yellow Buick with a vinyl top. Ida Jean Shaw was driving. There were two others in the back seat, one male and one female. The car traveled north toward town (the town of Wauchula). At about 8:00 o'clock, the car came back, travelling "pretty fast" in a southerly direction on New York Avenue, with the appellant driving, Ida Jean Shaw in the front seat, and one of the other two people in the car lying down across the back seat.

The husband of the Kerseys' granddaughter testified that Mr. Kersey usually kept large amounts of money on his person. He generally kept the cash in the form of one-hundred-dollar bills. It was not unusual for him to have from ten to twenty of these on his person at any given time. He kept the money in his wallet, and the wallet was in his hip pocket at all times. He normally slept in his regular work clothing and kept the wallet in his pocket even as he slept.

Mr. Kersey, the witness testified, liked to show his money to people he dealt with, and he did so frequently and indiscriminately. He tended to save his money rather than to spend it, and he was proudly vocal about having it. He was a large, strong man who felt that he could protect his wallet.

Another witness testified that two weeks prior to the murders, he saw that Mr. Kersey had from twelve to fifteen hundred dollars on his person.

A few weeks prior to the murders, Earl Enmund and a friend jointly purchased a calf from Mr. Kersey. They paid him in cash and when Mr. Kersey took out his wallet to put away the money he showed them its contents. Enmund said, "Look at the money this man's got." Mr. Kersey responded, "That ain't no money. I can dig up $15,000, $16,000 any time I want to." Enmund's friend told Mr. Kersey that he shouldn't be showing his money around like that. Mr. Kersey said, "I know you, Jim." The other man responded, "Yeah, you know me but you don't know the rest of them." After the killings, Mr. Kersey's wallet was not found on his person or anywhere in the house.

J. B. Neal testified that at about noon on April 1, 1975, he saw Sampson Armstrong in Lake Placid, in Highlands County. Armstrong told Neal that he and his wife Jeanette had done a robbery that morning at a ranch house outside of Wauchula and that Jeanette had been shot. Armstrong told the witness that they had gone to the back door of the house of an elderly man and woman, saying that they needed water for an overheated car. When Mr. Kersey came out of the house, Armstrong grabbed him, held his gun on him, and told Jeanette to get the money out of his pocket. Then, the old man cried out to his wife, and through the window Armstrong saw Mrs. Kersey coming out the front door and around the house with a gun. Mrs. Kersey shot Jeanette Armstrong. Then Armstrong knocked the old man down and shot Mrs. Kersey. Mr. Kersey got back up and Armstrong shot him in the chest. After the shooting, they put the old people in the house, took the money and left.

Jeanette Armstrong is the daughter of Ida Jean Shaw. In April of 1975, Ida Jean Shaw and Earl Enmund were living together as husband and wife, and had been doing so for about twelve years.

There was testimony that the investigating authorities, based on witnesses' descriptions of the car seen near the Kersey home the morning of the murders, began to search for a large, yellow or cream-colored car with a dark top and having a number 18 license tag prefix. They found a car meeting this general description in the possession of Ida Jean Shaw.

At Walker Memorial Hospital in Avon Park on the morning of the murders, police questioned Ida Jean Shaw concerning Jeanette Armstrong's gunshot wound. She told them that she and Jeanette had been travelling that morning from Wauchula to Avon Park when Jeanette entered an orange grove to urinate and was shot. In the subsequent course of the investigation of the Kersey murders, Ida Jean Shaw gave a statement to the state attorney implicating Earl Enmund and Sampson Armstrong in the crimes. Subsequent to that initial statement, she gave two statements, one of them a formal deposition, in which she repudiated the original statement. In these statements she said that Jeanette Armstrong left her house on March 31, 1975 with two men referred to as Luke and Willie. According to this story, Jeanette said that they were going to Fort Myers to a nightclub. On the following morning, Luke and Willie brought Jeanette home wounded. Jeanette, Luke and Willie then told Ms. Shaw to tell anyone who asked that Jeanette had been shot while trespassing in a citrus grove. The import of the story told in the depositions was to implicate "Luke and Willie" in the Kersey murders and to exculpate the defendants. In one of her depositions, Ida Jean Shaw stated that her earlier statement implicating the defendants in the crimes was false and was fabricated by agreement with Jeanette Armstrong and calculated to put Enmund and Armstrong in jail and thus be free of the strictures of married life.

Ida Jean Shaw, over the objections of the defendants, was called to testify at trial as a court's witness. The court examined her and then the state and counsel for each of the defendants cross-examined her.

Ms. Shaw testified at trial as follows. At and around the time of the crimes, she and Enmund lived together in a house on Revell Road in Wauchula, and that they had held themselves out to friends and neighbors and in business transactions as husband and wife for twelve years. Her daughter Jeanette was married to Sampson Armstrong and lived in Lake Placid. On the weekend preceding Tuesday, April 1st, Ms. Shaw celebrated a birthday. On Friday night, Jeanette came to her home. On Sunday, she and Jeanette went to Lake Placid and brought Sampson Armstrong back. On Monday night, March 31, Jeanette Armstrong, Enmund, and the appellant were all there at the house in Wauchula. On Tuesday, April 1st, when she awoke at about 7:45 a. m., none of the three was there. Neither was her brown and yellow 1969 Buick.

Ms. Shaw got up and went to the neighborhood wash house. About ten minutes later, either Enmund or Sampson Armstrong came into the wash house and told her that Jeanette had been shot. Ida Jean Shaw went back to the house. Jeanette was in Earl Enmund's red Plymouth automobile. The appellant was with her and Enmund was in the house. Ms. Shaw then took Jeanette up to the local store corner and called an ambulance. Then Enmund came to the corner where they were awaiting the ambulance and asked her what had happened to Jeanette. Ida Jean Shaw told Enmund that Jeanette had been shot in an orange grove. Then the ambulance came and Ida Jean accompanied Jeanette on the ride to the hospital. Ida Jean learned from Jeanette how she was shot. Earl followed in a separate car. Sampson Armstrong also went to the hospital that day.

After spending Tuesday morning at the hospital, Ms. Shaw left there with Earl and Sampson. They went to Wauchula to get the children and then went on to Lake Placid. On the way to Wauchula, Ida Jean Shaw asked Enmund "why he did it." He replied that he had seen Mr. Kersey's money and therefore decided to rob him. Sampson Armstrong said that he made sure the people were dead.

Ida Jean Shaw testified further that on Wednesday, April 2, 1975, she, Earl, Sampson, and some of her children were in a car on their way home from the hospital when Sampson gave her $200. By passing written notes in the car, she asked him how much money he got out of the robbery and he responded that he had $600 left. She took the $200 and made a loan payment on an account of Earl Enmund's that was in arrears. There was corroborating testimony of this, and that the bill was paid with two one-hundred-dollar bills.

Ms. Shaw testified that prior to the events of April 1st, she kept a .22 caliber pistol in the glove compartment of her car. On April 2, she removed the gun from the loft at her house on Earl Enmund's directions. He and Sampson told her to get rid of the gun and also a .38 caliber pistol that was at the house, because, Sampson said, they had been used to kill some people. She put the guns in the bottom of a bucket of greens and gave the bucket to a friend, Jeanette's paternal uncle. This person testified that the bucket was a large and heavy metal one and that the greens spoiled in the trunk of his car. He said he threw them away, bucket and all, and didn't know about the guns. The murder weapons were never recovered.

At trial Ms. Shaw testified that the story about Luke and Willie was a complete fabrication, and that she made up the story and related it at the request of the defendants. Earl Enmund, she said, instructed her on this matter in letters smuggled out of the jail.

The state's counsel moved that Ida Jean Shaw be called as a court's witness on the ground that due to the inconsistencies in her pretrial statements, the state was not certain how she would testify and would not vouch for her credibility. Through her examination by the court, cross-examination by the state, and cross-examination by counsel for each of the defendants, the following matters pertaining to her credibility were brought out for consideration by the jury. Ms. Shaw was granted immunity

from prosecution for any role she might have played in the murders and robbery. As related above, she gave several inconsistent statements during the investigation and prosecution of the crimes. One of her statements was in a deposition under oath, and at trial she conceded that she had lied in that statement. Prior to the trial, she was charged with perjury. She was arrested and held in jail for thirteen days. The prosecutors advised her of the maximum penalty for the crime of which she stood accused. Then they promised her that she would not be prosecuted for perjury if she would testify at the murder and robbery trial and tell the truth.

II. Issues on Appeal of the Judgment of Conviction

The appellant raises several points which he contends require the reversal of his convictions.

The appellant argues that the trial court erred in admitting the testimony of Ida Jean Shaw. He asserts that her inconsistent pretrial statements, which resulted in a charge of perjury, rendered her so unreliable as to be an incompetent witness. He also contends that the pendency of her perjury prosecution, which she was promised would be discontinued if she would testify truthfully, created an unacceptably high risk that her testimony would be the product of coercion.

[1] With regard to the unreliability argument, the trial court informed the jury that Ms Shaw was being called as a court's witness because the state could not vouch for her credibility. The jury was instructed to consider her testimony and to accord it whatever credibility they thought it deserved. It is within the discretion of the trial judge to call an uncooperative witness as a court's witness to allow the state to ask leading questions. *McCloud v. State*, 335 So.2d 257 (Fla.1976).

With regard to the issue of coercion, the appellant cites *Davis v. State*, 334 So.2d 823 (Fla. 1st DCA 1976), *cert. denied*, 345 So.2d 427 (Fla.1977), and *Lee v. State*, 324 So.2d 694, 695 (Fla. 1st DCA 1976). The *Lee* case quoted this Court's statement in *Mathews v. State*, 44 So.2d 664, 669 (Fla.1950), that in interviews with witnesses before trial, the examiner "must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."

Lee v. State, 324 So.2d at 698.

In *Davis*, the prosecuting attorney asked the trial court to delay the swearing of the jury because one of the witnesses he intended to call had become uncooperative. The witness, a close friend of the defendant, had made a statement in a deposition which linked the defendant to the crime but immediately before trial gave a different account of what she knew. The prosecutor conferred with her and told her that she had three choices: refuse to testify and be held in contempt of court and jailed; give an account that differed from her deposition statement and be charged with perjury and possibly imprisoned for fifteen years; or testify to "the truth" in which event nothing would happen to her. The circumstances of the prosecutor's conference with the witness were revealed to the jury. On appeal, the district court reversed and remanded for a new trial, citing as authority *Lee v. State*. Applying the *Lee* principle to the facts before it, the court in *Davis* concluded:

> While it is true that the assistant state attorneys admonished the witness to tell the truth, it must have been obvious to the witness that the "truth" was that which she had testified to at an earlier deposition. Rules of evidence and procedure exist which are designed to assist prosecution and defense alike in eliciting the truth from balky witnesses. Coercion and threats are not among these rules.

Davis v. State, 334 So.2d at 826.

[2] The appellant contends that when the prosecution told Ida Jean Shaw that she could be released from jail and have the perjury charges dropped if she would tell "the truth", there is an unacceptably high probability that she understood that the "truth" the prosecution wanted was testi-

mony linking the appellant to the crimes. We disagree. In *Lee v. State*, the error was not in allowing the witness to testify but in keeping from the jury information regarding the arrangement by which the state gained the cooperation of the witness. In *Davis*, the prosecutor indicated to the witness that she should testify consistently with what she said before. Thus he "injected" information. In the case *sub judice*, the prosecution did not suggest to Ms. Shaw what they wanted her to say, but simply advised her to tell the truth. We hold that the court did not abuse its discretion in allowing into evidence the testimony of Ida Jean Shaw.

[3-5] The appellant contends that a new trial is required because the jury was not fully informed of the understanding between the state and Ida Jean Shaw. It is true, as appellant points out, that it is a denial of due process if the jury is misled as to facts bearing on the credibility of a witness. *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). If a failure to fully inform the jury of the interest of a witness could in any reasonable likelihood have affected the decision of the jury, a new trial is required. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Wolfe v. State*, 190 So.2d 394 (Fla. 1st DCA 1966). Our review of the record reveals that the jury in the present case was fully informed of Ms. Shaw's immunity transaction and her pending perjury prosecution.

Having given careful consideration to appellant's arguments, and having reviewed the record to determine the sufficiency of the evidence, we affirm the judgment of conviction.

III. Sentence

We come now to the consideration of the sentences of death imposed on the appellant pursuant to section 921.141, Florida Statutes (1975).

[6] Appellant contends that the trial judge's factual findings on which he based the decision to impose death were derived in part from information not disclosed to the appellant and which he therefore had no opportunity to rebut, explain, or deny. A death sentence based on such nondisclosed information would violate the rule of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). During the pendency of this appeal, we directed the judge who imposed the sentences in this case to state whether he did so based on any such nondisclosed information. We are satisfied from his response that there was no due process violation under *Gardner*.

The appellant advises us that Jeanette Armstrong, originally a co-defendant with him, was tried separately, convicted of two counts of second-degree murder and one count of robbery, and sentenced to three consecutive life sentences. He argues that his death sentences must be vacated because the jury was not advised of the ultimate disposition of the charges against Jeanette Armstrong.

[7] In *Messer v. State*, 330 So.2d 137 (Fla.1976), we vacated the sentence of death, partly on the ground that the court erred in refusing to permit the defendant to submit to the jury evidence of the plea-bargained conviction and sentence of the appellant's accomplice. Any evidence reasonably related to a valid mitigating consideration should, when proffered by the defendant, be admitted into evidence at the sentencing phase of a capital felony trial. *See, e. g., Miller v. State*, 332 So.2d 65 (Fla.1976). Appellant did not proffer the evidence in question. Therefore, even assuming the information had some valid mitigating value, we can find no trial court error under the *Messer* rule.

After the sentencing hearing was held and sentencing arguments presented to the jury, the jury recommended a sentence of death. The trial judge sentenced appellant to death and subsequently put his findings and considerations in writing as follows:

> In accordance with the mandate of the Florida Supreme Court the Court makes the following findings of fact:
>
> 1. As an aggravated circumstance, the capital felony, that is, the murders of Thomas Henry Kersey, aged 86 years and

his wife Eunice Maye Kersey, aged 74, were committed while the defendant Armstrong was engaged, or was an accomplice, in the commission of or an attempt to commit an armed robbery. FS 921.141(5)(d).

2. As a further aggravating circumstance, the Court findings that the capital felony was committed for pecuniary gain. FS 921.141(5)(f). The evidence is abundantly clear that the armed robbery was committed for pecuniary gain and that the co-defendant Earl Enmund was previously aware that Mr. Kersey had a reputation for keeping large sums of money on his person. The co-defendant Enmund actually saw Mr. Kersey with money, and the testimony amply indicates that the armed robbery of April 1, 1975, was planned ahead of time by the co-defendant Enmund and that the defendant Armstrong participated in the planning and preparation.

3. As a further aggravating circumstance, the Court finds that the capital felony was especially heinous, atrocious, or cruel. FS 921.141(5)(h). The evidence amply supports a finding that the killing of Mr. Kersey aged 86, and Mrs. Kersey aged 74, was not a spontaneous matter. A reasonable person must conclude that the killings were done for no other purpose than to eliminate Mr. and Mrs. Kersey as witnesses to the armed robbery. The killings were premeditated in that Mr. Kersey was shot two (2) times and Mrs. Kersey was shot six (6) times. Two (2) bullets were subsequently recovered from the house, one (1) in the water heater and one (1) in the doorjamb. The medical examiner testified that in his opinion the bodies had to have been shot while in a prone position (his alternative explanation was that someone could have stood on a roof and shot down, or else tied the Kerseys' by their feet, hoisted them up and shot them from below). The entry of the bullets indicates that Mr. and Mrs. Kersey were in a prone position, that is, helpless to resist. The evidence indicates that Mrs. Kersey was shot first in the left side and that these wounds were not fatal, and that thereafter someone stood back and fired upon her prone body and then fired the bullets into the heater and the wall. Further, two (2) different weapons, that is, a .22 caliber weapon and a .38 weapon were fired at and into Mr. and Mrs. Kersey.

Three individuals were charged with these crimes. The co-defendant Enmund and the defendant Sampson Armstrong were tried together and the defendant Jeanette Armstrong was tried separately. The Court knows from this trial and from the trial of Jeanette Armstrong that she was shot at the scene and sustained serious wounds. Since the defendant Jeanette Armstrong was seriously wounded and since both Mr. and Mrs. Kersey were each shot with bullets from two (2) different caliber guns, and since the evidence establishes that Mr. and Mrs. Kersey were each shot while in the prone position, it is only reasonable to conclude, and the Court so finds, that the co-defendant Enmund and the defendant Sampson Armstrong, each fired into the bodies of Mr. and Mrs. Kersey.

4. The other aggravating circumstances to-wit: FS 921.141(5)(a); 921.141(5)(b); 921.141(5)(c); 921.141(5)(e); and 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving the defendant Sampson Armstrong, the Court makes the following findings:

1. The Court has considered FS 921.141(6)(a), and finds that the defendant has previously been convicted of, and was on parole for, a felony at the time of the instant offenses, to-wit: Breaking and Entering.

2. As to FS 921.141(6)(b), the defendant Armstrong attempted to establish that he was under the dominance of the co-defendant Enmund and the co-defendant Jeanette Armstrong, his wife, however, this attempt failed and there is no believable evidence that the capital felony was committed while the defendant Armstrong was under the influence of extreme mental or emotional disturbance.

3. As to FS 921.141(6)(c), there is absolutely no evidence that the victims were a participant in the defendant's conduct or consented to the act.

4. As to FS 921.141(6)(d), the evidence clearly indicates that the defendant was an active accomplice to the capital felony and that his participation in the capital felony was major. As stated in paragraph 3 of the aggravating circumstances, the evidence leads to the reasonable conclusion that the defendant Armstrong fired into the prone bodies of Mr. and Mrs. Kersey.

5. As to FS 921.141(6)(e), there is no believable evidence that defendant acted under extreme duress or under the substantial domination of another person. (See paragraph 2 above)

6. As to FS 921.141(6)(f), there is absolutely no evidence that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. As to FS 921.141(6)(g), the defendant was 23 years of age at the time of this offense and this constitutes the only possible mitigating circumstance as to the defendant Armstrong.

Therefore, in consideration of the evidence presented at trial and at the sentencing hearing as to the defendant Sampson Armstrong, the Court finds that the aggravating circumstances, and upon consideration thereof, the Court was of the opinion at the time of sentencing and is now, some months later, that the sentence of death is justified and appropriate as to each Count of Murder in the First Degree.

The trial court found three aggravating circumstances: that the murders were committed in the course of a robbery; that they were committed for pecuniary gain; and that they were especially heinous, atrocious and cruel. The court also stated that appellant's age of 23 years at the time of the crime "constitutes the only possible mitigating circumstance." On review of the sentencing findings, evidence, and record we conclude that this statement does not constitute a finding of a mitigating factor based on youth. The court found that there were no mitigating circumstances and the factor of age was given no consideration.

[8, 9] The court's findings that the capital felonies were committed in the course of robbery and that the capital felonies were motivated by pecuniary gain both "refer to the *same* aspect of the defendant's crime." *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). The robbery circumstance and the pecuniary motive constitute "only one factor which we must consider in this case." *Id.* at 786. Where such double consideration of one factor appears to have impaired the process of weighing the aggravating circumstances against the mitigating circumstances, the sentence of death must be vacated. *See Elledge v. State*, 346 So.2d 998 (Fla.1977). The "mere recitation of both circumstances," however, "does not in all cases call for a condemnation of the sentencing hearing and judgment." *Hargrave v. State*, 366 So.2d 1, 5 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). The fact that the murders took place in the course of a robbery and that the criminal episode was motivated by pecuniary gain constitute one valid aggravating circumstance, amply established by the evidence.

[10] The finding that the murders were especially heinous, atrocious, and cruel cannot be sustained. The language of this statutory aggravating circumstance was expounded upon in *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The majority opinion in that case said:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by

such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim. *Id.* at 9. Based on that interpretation, the Court stated in *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2220, 53 L.Ed.2d 239 (1977), that a murder by shooting that causes instantaneous death is simply not in the "heinous, atrocious, or cruel" category.

[11] In support of his finding that the killings were especially heinous, atrocious, or cruel, the trial judge made reference to the ages of the victims and stated that the killings were "not a spontaneous matter." The testimony at trial revealed, however, that the murders were only at the scene of the crime for a very brief period. The shots were heard at 7:45, the victims were found dead at 8:00 o' clock. The only direct account of what transpired is from the testimony of J. B. Neal about Armstrong's statement to him. By that account, the shootings were indeed spontaneous and were precipitated by the armed resistance of Mrs. Kersey. The judge also found support for the finding of this factor in the fact that the murders were premeditated. Nothing in section 921.141, as it stood at the time of the crimes and the trial of this case, nor in the decisions of this Court construing it, supports the proposition that the factor, heinous, atrocious, or cruel is established by the existence of premeditation.

[12] Discussing further the basis for his finding, the judge said, "A reasonable person must conclude that the killings were done for no other purpose than to eliminate Mr. and Mrs. Kersey as witnesses to the armed robbery." A purpose to eliminate witnesses has been said to support the finding that a capital felony "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." § 921.141(5)(e), Fla.Stat. (1975); *Riley v. State*, 366 So.2d 19 (Fla.1978). In order for such witness-elimination motive to support a finding of the avoidance of arrest circumstance when the victim is not a law enforcement officer, "[p]roof of the requisite intent to avoid arrest and detection must be very strong . . ." *Riley v. State*, 366 So.2d at 22.

It has been said that execution-type slayings, evincing a cold, calculated design to kill, fall into the category of heinous, atrocious, or cruel. *Magill v. State*, 386 So.2d 1188 (Fla.1980); *Alvord v. State*, 322 So.2d 533 (Fla.1975), *cert. denied*, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). In order to invoke such a basis for a heinousness finding, however, the same standard of proof as is required to establish a purpose to eliminate witnesses should be applied. It simply cannot be said that there was proof that the robbers killed in order to assure that there would be no witnesses against them.

The trial judge based his conclusion on the testimony of the pathologist. The judge found the testimony to show that the victims, after the initial shooting, were laid out prone and then "finished off." The testimony of the pathologist makes clear, however, that his conclusions as to the direction of fire and the positions of the victims when shot were equivocal at best. Thus it was insufficient to prove that the motivation was witness elimination. It is possible to infer that the robbers used their guns in order to increase their chances of departing the Kersey ranch with their lives.

[13] The jury recommended death. The trial judge erroneously considered certain circumstances as aggravating. The error did not impair the process of weighing the aggravating against the mitigating circumstances because there were no mitigating circumstances to weigh. The killings took place in the course of a robbery. Death is the appropriate punishment. The sentences of death are affirmed.

It is so ordered.

ADKINS, BOYD, OVERTON and ENGLAND, JJ., concur.

SUNDBERG, Chief Justice, concurs as to conviction, and dissents as to sentences:

Due to substantial errors in the aggravating findings, I dissent from affirming the

death sentences and would remand for re-sentencing by the trial judge only.

APPENDIX E

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY, FLORIDA

SEPTEMBER TERM 19 75

CASE NO. 75-110

STATE OF FLORIDA

vs

Sampson Albert Armstrong
Defendant

SEP 30

C.C.

JUDGMENT AND SENTENCE

The Defendant SAMPSON ALBERT ARMSTRONG being personally before this Court, represented by JON ANDERSON, his attorney of record, having been tried and found guilty of the crime of / entered a plea of guilty to the crime of / entered a plea of Nolo Contendere to the crime of COUNT I. FIRST DEGREE MURDER. COUNT II. FIRST DEGREE MURDER. COUNT III. ROBBERY

and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant SAMPSON ALBERT ARMSTRONG is hereby adjudicated guilty of the crime of *. It is the sentence of the law that said Defendant be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of *** in the institution in the State Correctional System to which said Department may cause you to be confined. (The Court recommends that you be confined at type institution.)

It is further ordered that you shall be allowed 154 DAYS credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is (concurrent)(consecutive) with the sentence imposed for the crime of in Case , County, No. .(Strike if not applicable.)

It is further ordered that the Sheriff of HARDEE County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24, Florida Statutes.

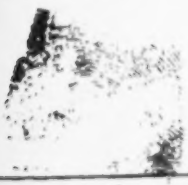
The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

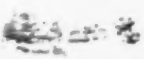
*FIRST DEGREE MURDER, ON BOTH OF THE TWO COUNTS, AND COUNT III, ROBBERY.
**THE REST OF YOUR NATURAL LIFE, FOR COUNT III, TO RUN CONCURRENT WITH COUNTS I AND II.
FOR COUNTS I AND II, TO BE TRANSPORTED TO STATE PRISON TO BE PUT TO DEATH BY ELECTROCUTION.

The following are the fingerprints of the above-named Defendant,

Sampson :

(FINGERPRINTS)

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				

6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

DONE AND ORDERED IN Open Court at HARDEE County, Florida, this 30th day of SEPTEMBER A.D. 19 75. I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, SAMPSON ALBERT ARMSTRONG and that they were placed thereon by said Defendant in my presence in Open Court this date.

William A. Pound
JUDGE

FILED FOR RECORD THIS 30TH DAY OF September A.D. 19 75 AT 8:03 O'CLOCK A.M. AND RECORDED IN VOL 13 OF CCM RECORDED

INDICTMENT

In the Circuit Court, For The Tenth Judicial Circuit of Florida HARDEE County. SPRING Term, in the year of our Lord one thousand nine hundred and SEVENTY-FIVE

The State of Florida

b

SAMPSON ALBERT ARMSTRONG

Indictment for

FIRST DEGREE MURDER

782.04(1)

(Capital Felony)

Two Counts

ROBBERY 813.011 (FELONY)

75-11

In the Name and by the Authority of the State of Florida:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that SAMPSON ALBERT ARMSTRONG of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and Seventy-Five in the County and State aforesaid unlawfully and from a premeditated design to effect the death of Thomas Henry Kersey, did inflict mortal wounds upon the said Thomas Henry Kersey, by shooting him with a firearm, a further description of which is to the Grand Jurors unknown, from which mortal wounds the said Thomas Henry Kersey did languish and die on the 1st day of April, 1975, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT TWO

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that SAMPSON ALBERT ARMSTRONG of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and seventy-five in the County and state aforesaid unlawfully and from a premeditated design to effect the death of Eunice Mae Kersey, did inflict mortal wounds upon the said Eunice Mae Kersey, by shooting her with a firearm, a further description of which is to the Grand Jurors unknown, from

A TRUE BILL _____, Foreman of Grand Jury

Presented in Open Court this ____ day of _____, 19____

STATE OF FLORIDA VS
SAMPSON ALBERT ARMSTRONG
PAGE 2

COUNT TWO CONTINUED

which mortal wounds the said Eunice Mae Kersey did languish and die on the 1st day of April, 1975, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT THREE

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that SAMPSON ALBERT ARMSTRONG of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and seventy-five in the County and State aforesaid unlawfully by force, violence or assault or putting in fear did feloniously rob, steal and take away from the person or custody of Thomas Henry Kersey money or other property the subject of larceny, by the use of a firearm, to-wit: cash, in currency and coin of the United States of America, the property of Thomas Henry Kersey, with intent permanently to deprive the owner of his property, and the said Thomas Henry Kersey was then and there entitled to the possession of the said cash as against the defendant SAMPSON ALBERT ARMSTRONG was not then and there the owner or entitled to possession of said cash, in violation of Section 813.011, Florida Statutes.

A TRUE BILL _____, Foreman of Grand Jury

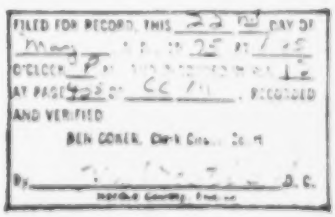
Presented in Open Court this 2nd day of May, 1975.

STATE OF FLOIRDA

COUNTY OF HARDEE

The undersigned State Attorney states that he as State Attorney of the Tenth Judicial Circuit in and for Hardee County, Florida, as authorized and required by law, has advised the Grand Jury returning this Indictment.

Glen Darty, as State Attorney
Tenth Judicial Circuit



APPENDIX G

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY, FLORIDA

STATE OF FLORIDA,	:	
Plaintiff,	:	
v.	:	CRIMINAL ACTION NO. 75-110
SAMPSON ARMSTRONG,	:	
Defendant.	:	

MOTION TO VACATE, SET ASIDE, OR
CORRECT CONVICTION AND SENTENCE

The defendant, Sampson Armstrong, by and through his undersigned counsel, and pursuant to Fla. R. Crim. P. 3.850, moves to vacate and set aside the judgment of conviction and the sentence of death in this case. The grounds for this motion, described in detail below, are that the judgment was entered and the sentence imposed in violation of the Constitution of the United States and the laws and Constitution of the State of Florida.

In support of this motion, defendant states the following:

1. On September 30, 1975, following a jury trial, defendant and his co-defendant, Earl Enmund, were convicted in this Court on two counts of first-degree murder, in violation of Section 782.04(1), Florida Statutes, and one count of robbery, in violation of Section 813.011, Florida Statutes.

2. At approximately 9:00 p.m. on September 30, 1975, following the jury's verdict, the Court conducted a separate sentencing proceeding before the trial jury, as required by Section 921.141, Florida Statutes.

3. The presentation of evidence concerning the two defendants, counsel's arguments to the jury, and the Court's instructions on sentencing were completed at 9:31 p.m.

4. At 10:02 p.m. on September 30, 1975, the jury recommended that both defendants be sentenced to death.

5. Immediately following the jury's recommendation, the Court sentenced defendant Armstrong and his co-defendant to death. On the robbery count, the Court sentenced the defendants to life imprisonment.

6. Defendant Armstrong testified in his own behalf in the guilt phase of the trial. He did not testify in the sentencing phase.

7. The judgment and sentences were affirmed by the Supreme Court of Florida on March 26, 1981. 399 So. 2d 953. The Chief Justice dissented with respect to the sentence of death. A petition for rehearing was denied on June 15, 1981.

8. On October 6, 1975, defendant filed a motion for a new trial in this Court. The motion was denied after oral argument but without an evidentiary hearing.

9. Apart from the motion described in paragraph 8, no previous post-conviction motion has been filed.

10. Defendant's appellate counsel failed to file a petition for a writ of certiorari in the Supreme Court of the United States.

STATEMENT

The evidence at trial was as follows:

11. At approximately 7:45 a.m. on April 1, 1975, Thomas Henry Kersey and Eunice Mae Kersey, an elderly white couple, were shot and killed at their house on Route 62 near Fort Green in Hardee County, Florida.

12. Defendant, his wife, Jeanette Armstrong, and Earl Enmund, the common-law husband of Jeanette's mother, Ida Jean Shaw, were charged with first-degree murder and robbery as a result of the Kersey shootings.

13. All three defendants are black.

14. Thomas Kersey and Eunice Kersey were each shot with two guns, a .22 caliber gun and a .38 caliber gun (Tr. 888-897).

15. A blood stain found on the floor of the Kersey house during the investigation of the shootings did not match the blood type of either Thomas Kersey or Eunice Kersey (Tr. 901-912).

16. A water jug full of water was found outside the Kersey house shortly after the shootings (Tr. 807).

17. On April 1, 1975, Jeanette Armstrong was shot in the left side with a .38 caliber bullet. She was treated at Walker Memorial Hospital in Avon Park, Florida (Tr. 882-884).

18. Ida Jean Shaw, when interviewed by police after Jeanette was shot, stated that the shooting had occurred in an orange grove, where she and Jeanette had stopped to urinate (Tr. 941-943, 989, 1007, 1174, 1232; R. 305-311). Shaw also stated that she discarded Jeanette's

bloody clothing in the bushes alongside Route 64 near the Hardee County/Highlands County line (Tr. 1020-1023).

19. Police found Jeanette Armstrong's clothes in the place described by Ida Jean Shaw (Tr. 1020-1023).

20. Jeanette Armstrong's blood type and the blood type of the blood found on the clothing discarded in the bushes alongside Route 64 matched the type of the blood found in the stain on the floor of the Kersey house (Tr. 901-912).

21. No fingerprints, other than those of the Kerseys, were found in the Kersey house (Tr. 809, 840).

22. Several weeks before the Kerseys were shot, co-defendant Enmund and another man, James Lindsey, purchased a cow from Thomas Kersey (Tr. 736-741, 747-750, 1257-1259).

23. On that occasion, Enmund noticed and remarked on the amount of money in Kersey's wallet (Tr. 736-741, 747-750, 1257-1259).

24. Neither money nor a wallet was found in the Kersey house after the shootings on April 1, 1975 (Tr. 836-837).

25. The State's principal witnesses against defendant were Ida Jean Shaw, Willie Lee, J. B. Neal, and Betty Wilson.

26. Ida Jean Shaw gave numerous inconsistent pretrial statements. At the time of defendant's trial, Shaw faced a charge of perjury based on allegedly false statements made under oath in her pretrial deposition (Tr. 929).

27. As a consequence of the perjury charges pending against Shaw, the State refused to call her as a prosecution witness.

28. Shaw testified at trial as a witness called by the Court (Tr. 918-922).

29. In exchange for her testimony, Shaw was given immunity from prosecution for murder or robbery in connection with the Kerseys' death (Tr. 929).

30. In addition, Shaw was told that her prosecution for perjury would be dropped if she told the truth at defendant's trial (Tr. 929).

31. Notwithstanding the grant of immunity and the promise with respect to the perjury prosecution, Shaw testified on direct examination by the Court that she did not think she had been promised anything in return for her testimony and that she did not think she had been told that she would not be prosecuted if she testified (Tr. 954).

32. On cross-examination by counsel for defendant, Shaw again testified that she did not think she had been promised anything in return for her testimony (Tr. 1002).

33. Shaw then testified that the prosecutor had told her that she would not be prosecuted for murder if she told the truth at defendant's trial (Tr. 1002-1003).

34. Throughout her testimony at trial, Shaw repeatedly admitted that she had lied and lied again in her pretrial statements (Tr. 960, 969, 972, 973, 977, 979, 984, 985, 986, 989, 1000, 1005, 1008, 1010).

35. Shaw testified that Jeanette Armstrong came to her home on Friday, March 28, 1975, to help Shaw celebrate her 35th birthday, which was the next day (Tr. 935).

36. Shaw further testified that on Sunday, March 30, 1975, she and Jeanette Armstrong went to Lake Placid, Florida, and picked up defendant and brought him back to the home of Shaw and co-defendant Enmund (Tr. 935).

37. Shaw stated that when she awoke at approximately 7:45 a.m. on April 1, 1975, defendant, co-defendant

Enmund, and Jeanette Armstrong were not at the house. She stated that all three were there the night before (Tr. 936).

38. Shaw also stated that her car, a yellow-and-brown Buick, was not at the house on the morning of Tuesday, April 1, 1975 (Tr. 937).

39. Shaw testified that at approximately 8:00 a.m. on April 1, 1975, defendant, co-defendant Enmund, and Jeanette Armstrong returned to the house, and Shaw learned that Jeanette Armstrong had been shot (Tr. 938-939).

40. Shaw testified that she went to the hospital with her daughter (Tr. 940-941).

41. On direct examination by the Court, Shaw said that she rode back to Wauchula from the hospital with defendant and co-defendant Enmund and that they then drove to Lake Placid. She testified that at no time during this trip on April 1 did she discuss what happened that morning with defendant or with co-defendant Enmund (Tr. 944-945).

42. On cross-examination by the prosecutor, after Shaw had been permitted to refresh her recollection by reading from her August 19, 1975, statement to the prosecutor, Shaw testified that during the trip back from the hospital on April 1, 1975, defendant said that "he made sure that the people was dead" (Tr. 958-959).

43. Shaw further testified that on April 2, 1975, as she, defendant, and co-defendant Enmund were returning from visiting Jeanette Armstrong in the hospital, defendant gave her $200 in cash (Tr. 948, 1000-1001).

44. Shaw testified that during the same automobile ride on April 2, 1975, she and defendant exchanged notes in which she asked "how much he got out of the robbery" and he said "he had $600 left" (Tr. 948, 998).

45. Shaw stated that she "never owned a gun" but that she always kept a .22 caliber pistol in the glove compartment of her car (Tr. 949-950).

46. Shaw further stated that either defendant or his wife, Jeanette Armstrong, owned a .38 caliber gun and that the last time Shaw saw the gun before April 1, 1975, Jeanette Armstrong had it (Tr. 951-952).

47. Shaw testified that sometime after April 1, 1975, the two guns were inside her house and that defendant and co-defendant Enmund told her to get rid of the guns (Tr. 951-952).

48. Shaw asserted that defendant said she should get rid of the guns "because they had killed some people" (Tr. 953).

49. Shaw testified that she put the guns in a bucket of greens that she gave to Jim Pugh, the brother of Jeanette Armstrong's father, Otis Pugh (Tr. 953).

50. On cross-examination by the prosecution, Shaw testified that in fact she had disposed of three guns, that the third gun was also a .38, and that she did not know to whom the third gun belonged (Tr. 964-965).

51. Before trial, Shaw gave statements to the effect that on Sunday night, March 30, 1975, or Monday night, March 31, 1975, Jeanette Armstrong left Shaw's house in Wauchula and went out with two men named Luke and Willie. According to Shaw's pretrial deposition, Luke and Willie brought Jeanette Armstrong back to her mother's house on the morning of April 1, 1975, after she had been shot (Tr. 968, 970, 1003-1007; R. 120-167). Shaw also stated before trial that she and Jeanette Armstrong had agreed to try to blame

the Kersey shootings on defendant and co-defendant Enmund, so that the men would go to prison and the women would be free of their husbands (Tr. 984-989).

52. The second important prosecution witness was Willie Lee, a neighbor of co-defendant Enmund and Ida Jean Shaw.

53. Lee testified that at around 6:30 a.m. or 6:45 a.m. on April 1, 1975, he was standing alongside the road in front of his house when he saw Ida Jean Shaw and Earl Enmund drive by in a yellow Buick with a vinyl top. Lee stated that Shaw was driving, Enmund was in the front passenger seat, and two other black persons, one man and one woman, were riding in the back seat (Tr. 1051-1052).

54. Lee did not recognize the other people in the car. He said he had never seen them before in his life (Tr. 1052, 1058).

55. Lee testified that the car was headed north (Tr. 1051-1052). That is the direction it would have been traveling if it had been headed to the Kersey house.

56. Lee further testified that he was still standing alongside the road at approximately 8:00 a.m. when he saw the yellow Buick return in the opposite direction (Tr. 1054-1055).

57. At that time, Lee testified, co-defendant Enmund was driving, the car was traveling at a high rate of speed, and one of the two people in the back seat was lying down on the other's lap (Tr. 1054-1055).

58. Lee stated that there were four people in the car when he saw it return, but he did not say that Ida Jean Shaw was one of the four (Tr. 1054).

59. Lee testified that he does not know defendant or Jeanette Armstrong and that he could not identify either of them as passengers in the Buick (Tr. 1074).

60. Lee admitted that he needed money to feed his 15 children, but he denied awareness of a $1,000 reward for information leading to a conviction in connection with the Kersey shootings (Tr. 1063-1065).

61. At his pretrial deposition, Lee admitted being a convicted felon and being "fifteen or sixteen thousand dollars" in debt (R. 83, 86). Neither of these facts was used to impeach Lee's testimony at trial.

62. The third major prosecution witness against defendant was J. B. Neal, a migrant worker who became acquainted with defendant in Lake Placid, Florida.

63. Neal testified that on April 1, 1975, sometime between 11:00 a.m. and 11:30 a.m., he was riding with his girl friend in Lake Placid, Florida, when defendant hailed him and asked to speak with him (Tr. 1096, 1106).

64. Neal stated that, after driving his girl friend home, he returned to the corner where defendant was waiting, and defendant got into Neal's car and told him to drive around the block (Tr. 1097).

65. Neal further testified that during the ride defendant said that he and his wife "had done a job" (Tr. 1097).

66. According to Neal, defendant said that an old man and an old woman were living at the place where they did the job and that "the old lady shot Jeanette" (Tr. 1098).

67. Neal testified that defendant told the following story (Tr. 1098-1102):

(a) Defendant went to the door of the house and asked the old man for water for an overheated car.

(b) When the old man went behind the house to get a jug for the water, defendant grabbed him, held a gun to him, and told Jeanette to get his money.

(c) The old man called to his wife, and the old lady came around the house and shot Jeanette.

(d) Defendant then knocked the old man down and shot the old woman.

(e) The old man got up, and defendant shot the old man.

(f) Defendant took the bodies into the house and laid them "head to head."

(g) Defendant stole "$2,000, if that" from the old man.

68. Neal testified that defendant, after recounting this story, gave Neal $20, in exchange for which Neal agreed to tell the authorities that he drove defendant from Lake Placid to Wauchula on the morning of April 1 (Tr. 1102).

69. Neal admitted that the Hardee County Sheriff mentioned a $1,000 reward to him when he was interrogated concerning defendant (Tr. 1103).

70. On cross-examination by counsel for defendant, Neal stated that he did not drive defendant to Wauchula on April 1, 1975 (Tr. 1105).

71. In his pretrial deposition, Neal stated that he did drive defendant to Wauchula on April 1, 1975 (R. 277-278).

72. This glaring inconsistency was not used to impeach Neal's testimony at trial.

73. The State's final important witness was Betty Wilson, a resident of Lake Placid, Florida, who testified that she had known defendant and his wife for a long time (Tr. 1088).

74. Wilson testified that defendant told her that he had heard his wife got shot in an orange grove and that two old people, who had been killed, had been shot with the same gun that shot Jeanette (Tr. 1089-1090).

75. Defendant and co-defendant Enmund each testified in his own defense.

76. Defendant testified that he was in Lake Placid on the morning of April 1, 1975. He stated that he did not go to Wauchula on March 30, 1975, that he was in Lake Placid all day on March 31, 1975, and that on the night of March 31, he slept in the room provided by his employer, Lucius Williams (Tr. 1153-1154, 1157-1158, 1160-1165).

77. Defendant further testified that he and his wife, Jeanette, argued on March 28, 1975, and that she went to stay with her mother, Ida Jean Shaw, as she had done in the past (Tr. 1156-1160).

78. Defendant testified that on his way to work on April 1, 1975, as he approached the corner in Lake Placid where fruit pickers assembled each day for transportation to the groves, he learned that someone had just called the public telephone booth at the corner in an effort to reach him and inform him that his wife had been shot (Tr. 1167, 1189-1190).

79. Defendant testified that, when he heard the news about his wife, he asked J. B. Neal to drive him to his

mother-in-law's house in Wauchula. Defendant testified that Neal did so, and that defendant paid him $20 for the ride (Tr. 1167-1172).

80. Defendant further testified that, when he arrived in Wauchula, co-defendant Enmund was at home and that they drove together to Walker Memorial Hospital in Avon Park, Florida, to visit Jeanette (Tr. 1171-1173).

81. Jim Hill, a friend and neighbor of defendant, testified that he saw defendant in Lake Placid between 7:00 a.m. and 7:30 a.m. on April 1, 1975. Hill testified that he and defendant talked for five or ten minutes on a street corner when Hill was on his way to work (Tr. 1202-1204).

82. Lake Placid is approximately 40 miles from Wauchula. Driving from one town to the other takes approximately one hour (Tr. 1198).

83. The Kerseys' house was approximately eight miles from Wauchula, in the opposite direction from Lake Placid (Tr. 780).

84. Gordon Goodson, a detective with the Hardee County Sheriff's Department, testified that he interviewed defendant at Walker Memorial Hospital at approximately 10:30 a.m. on April 1, 1975. The interview lasted about 15 minutes (Tr. 1207-1208).

REASONS FOR GRANTING POST-CONVICTION RELIEF

85. Following is a brief discussion of several of the grounds that warrant relief from defendant's sentence on conviction. Because defendant's present counsel began their involvement in this case within the last four weeks, the list of arguments presented below does not purport to be exhaustive. Nor are the arguments fully developed and supported with all the legal citations and evidence that may be gathered on further investigation. The Governor's signing of defendant's death warrant on March 4, 1982, has sharply curtailed the opportunity for thoroughgoing research and exploration of the facts of the case. Nevertheless, the contentions set forth below are more than adequate to justify the granting of relief. We begin with the reasons for the invalidity of defendant's death sentence and then turn to the grounds on which defendant's conviction should be set aside.

I. INVALIDITY OF THE DEATH PENALTY IN THIS CASE

A. THE GOVERNING FLORIDA STATUTE AND THE TRIAL COURT'S INSTRUCTIONS TO THE JURY IMPROPERLY LIMITED THE MITIGATING CIRCUMSTANCES THAT COULD BE CONSIDERED

86. Defendant's death sentence is invalid because the procedure by which it was imposed violates the requirements of the Eighth and Fourteenth Amendments, as explained in Lockett v. Ohio, 438 U.S. 586 (1978).

87. Defendant was convicted and sentenced in September 1975. At that time, the Florida statute that governed the sentencing proceeding, Section 921.141, listed seven specific mitigating circumstances that could be

considered by the jury in rendering its advisory sentence. See Section 921.141(6).

88. The statute further provided that, in rendering its advisory sentence, the jury should determine "[w]hether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist * * *." Section 921.141(2)(b) (emphasis added).

89. The Florida statute further provided that, in imposing a sentence of death, the Court must make a written finding that "there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances." Section 921.141(3)(b) (emphasis added).

90. At the conclusion of the sentencing proceeding in this case, this Court instructed the jury to determine "whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist" (Tr. 1434) (emphasis added).

91. The Court then listed the seven specific mitigating circumstances provided by statute (Tr. 1435-1436).

92. The jury's verdict form explicitly stated that the jury had answered negatively the question "whether sufficient mitigating circumstances defined by the Court's charge do outweigh such aggravating circumstances" (Tr. 1436) (emphasis added).

93. In imposing sentence, this Court stated (Tr. 1446):

> I find that the [aggravating circumstances found to exist] are not set off by mitigating circumstances, in particular, the age of the Defendant, nor do I find from my review of the evidence of the case that the Defendant was acting under duress nor under the substantial domination of another person.

94. In written findings entered 19 months later in accordance with the mandate of the Florida Supreme Court, this Court stated that "the defendant was 23 years of age at the time of this offense and this constitutes the only possible mitigating circumstance as to the defendant Armstrong" (399 So. 2d at 962).

95. In affirming defendant's conviction and sentence, the Florida Supreme Court stated (399 So. 2d at 962):

> On review of the sentencing findings, evidence, and record we conclude that this statement does not constitute a finding of a mitigating factor based on youth. The [trial] court found that there were no mitigating circumstances and the factor of age was given no consideration.

96. The language of the statute, the Court's instructions to the jury, the jury's verdict, the Court's sentencing findings, and the opinion of the Florida Supreme Court all demonstrate that the jury could have rendered an advisory verdict of life imprisonment only if it found that one or more of the specific mitigating circumstances listed in the statute and in the Court's instructions outweighed the aggravating circumstances found to exist.

97. This limitation of mitigating circumstances to an enumerated list is inconsistent with the Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), reaffirmed two months ago in Eddings v. Oklahoma, 102 S. Ct. 869, 874-875 (1982), and followed in Washington v. Watkins, 655 F.2d 1346, 1369-1371, 1373-1377 (5th Cir. 1981).

98. The rule adopted and applied by the Supreme Court in Lockett and Eddings is that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor" (102 S. Ct. at 875) (emphasis added).

99. The factors recognized by the Supreme Court as relevant include "any aspect of a defendant's character or record" (438 U.S. at 604, quoted in 102 S. Ct. at 874) (emphasis added).

100. At the sentencing proceeding in this case, Betty Fine, defendant Armstrong's parole officer, testified that defendant is an epileptic, that he suffers from severe headaches, that he had numerous financial problems, that he and his wife had marital difficulties attributable to her infidelity, and that his wife "on occasion hit him in the head with a bottle and * * * [once] bit him on the side of the face," leaving a scar (Tr. 1417-1420).

101. Fine also testified that defendant was "substantially dominated by Jeanette Armstrong, by her emotional hold over him" (Tr. 1420).

102. Apart from the single item of testimony described in the preceding paragraph, the jury could not consider any of the matters mentioned in Fine's testimony as mitigating factors to be weighed against the aggravating circumstances found to exist.

103. Moreover, because this Court announced before the sentencing proceeding began that its instructions to the jury would paraphrase the statute and would refer to "mitigating circumstances as defined in the Court's charge" (Tr. 1402; emphasis added), defendant may have been discouraged from introducing evidence of other relevant mitigating factors.

104. These factors include (a) defendant's low IQ; (b) his minimal amount of schooling; (c) his poor reading and writing ability; (d) his illegitimacy; (e) his poverty; (f) his lack of any adult male supervision at any time in his

life; (g) his separation from his mother when he was approximately two years old; (h) his upbringing in the home of his grandmother, where discipline was exceedingly lenient; (i) his regular church attendance in Lake Placid, Florida; (j) his participation as a musician at religious meetings and revivals; and (k) his reputation as a competent and diligent worker.

105. The failure to permit the jury to weigh any and all mitigating circumstances against the aggravating circumstances found to exist prejudiced defendant's cause, in violation of the Eighth and Fourteenth Amendments, and his sentence of death is therefore invalid.

B. THE FLORIDA SUPREME COURT'S CONCLUSION THAT TWO OF THE THREE AGGRAVATING CIRCUMSTANCES FOUND BY THIS COURT ARE NOT SUPPORTABLE RENDERS THE SENTENCE OF DEATH INVALID

106. In sentencing defendant to death, this Court announced that it had found three aggravating circumstances. The Court said (Tr. 1445-1446):

> In particular do I find that this capital felony was committed while the defendant was engaged or was in the commission of or the attempt to commit or flight after committing or attempting to commit the offense of robber More particularly do I find that the capital felonies were committed for pecuniary gain. I further find that the capital felonies were especially heinous, atrocious or cruel.

107. In its written findings made 19 months after trial in response to the mandate of the Florida Supreme Court, the Court again listed three aggravating circumstances under Section 921.141(5), Florida Statutes. The Court said that the murders of the Kerseys were committed during the course of an armed robbery, that they were "especially heinous, atrocious, or cruel" (399 So. 2d at 960-961). The

Court relied on subsections (5)(d), (5)(j), and (5)(h) of Section 921.141, and it said that the other aggravating circumstances listed in the statute "are inapplicable in this case" (399 So. 2d at 961).

108. On appeal, the Florida Supreme Court found that two of the three aggravating circumstances found by this Court are not supportable (399 So. 2d at 962-963).

109. First, relying on its earlier decision in Provence v. State, 337 So. 2d 783, 786 (1976), cert. denied, 431 U.S. 969 (1977), the Supreme Court held that "[t]he robbery circumstance and the pecuniary motive" properly constitute only one aggravating circumstance.

110. Second, relying on its earlier decisions in State v. Dixon, 283 So. 2d 1, 9 (1973), cert. denied, 416 U.S. 943 (1974), and Cooper v. State, 336 So. 2d 1133 (1976), cert. denied, 431 U.S. 925 (1977), the Supreme Court ruled that "[t]he finding that the murders were especially heinous, atrocious, and cruel cannot be sustained" (399 So. 2d at 962).

111. Accordingly, the Supreme Court concluded, as a matter of state law, that "[t]he trial judge erroneously considered certain circumstances as aggravating" and that there was only one valid aggravating circumstance (399 So. 2d at 963).

112. Over the dissent of the Chief Justice, the Supreme Court affirmed the sentence of death on the ground that this Court's error "did not impair the process of weighing the aggravating against the mitigating circumstances because there were no mitigating circumstances to weigh" (399 So. 2d at 963).

113. A death sentence imposed in part on the basis of erroneous aggravating circumstances cannot stand. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified on petition for rehearing, 648 F.2d 446, cert. granted, No. 81-89 (Oct. 5, 1981). The Fifth Circuit explained its decision in Stephens in the following terms (id. at 406, as modified):

> It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The instruction on the invalid circumstance may have unduly directed the jury's attention to his prior convictions. It cannot be determined with the degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty.

114. These principles are fully applicable to this case. If the jury had been instructed that "[t]he robbery circumstance and the pecuniary motive" could together constitute only one aggravating circumstance and, further, that the evidence at trial was insufficient as a matter of law to support a finding that the murders were "especially heinous, atrocious, or cruel," the jury's advisory sentence might well have been different. If this Court had received a different recommendation from the jury or if the Court itself had realized that at most one aggravating circumstance was established by the evidence, its sentencing decision might well have been different.

115. Because a reviewing court cannot determine satisfactorily that the sentence was not decisively affected by the improper aggravating circumstances, the sentence of

death must be vacated and set aside. See, e.g., Stromberg v. California, 283 U.S. 359, 367-368 (1931); Bachellar v. Maryland, 397 U.S. 564, 570-571 (1970); Street v. New York, 394 U.S. 576, 585-588 (1969); Yates v. United States, 354 U.S. 298, 311-312 (1957).

116. The decision in Stephens was recently followed in a Florida case in which the State argued that presentation of evidence concerning an improper aggravating circumstance was harmless error where the record adequately supported a valid aggravating circumstance and where there were no mitigating circumstances. Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981). The court of appeals rejected the State's argument, because the court could not be certain what the result would have been if the improper aggravating circumstances had not been considered. Citing Stephens, the court explained (661 F.2d at 59-60) (footnote omitted):

> Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.

117. The Fifth Circuit's decisions in Stephens and Henry are controlling law in the new Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

118. Because this Court considered unsupported aggravating circumstances in imposing the death penalty, that aspect of defendant's sentence is invalid and should be set aside.

C. THE FLORIDA SUPREME COURT INCORRECTLY CONCLUDED THAT THIS COURT DID NOT FIND DEFENDANT'S AGE TO BE A MITIGATING CIRCUMSTANCE

119. For purposes of this argument, we assume that Stephens and Henry do not control and that the Florida Supreme Court acted properly in attempting to evaluate defendant's death sentence on the basis of the one valid aggravating circumstance that it found supported by the record. Even so, the Court erred.

120. Both at the conclusion of trial and in its written findings 19 months later, this Court indicated that it regarded defendant's age as a mitigating circumstance. See Paragraphs 93 and 94 above.

121. Having concluded that only one aggravating circumstance was supported by the record, the Florida Supreme Court reasoned that it could still affirm defendant's death sentence if no mitigating circumstances had been established (399 So. 2d at 962-963).

122. The Florida Supreme Court reviewed the record and erroneously determined that this Court did not find defendant's age to be a mitigating circumstance.

123. The state Supreme Court misconstrued this Court's findings, without making any effort to have those findings clarified by this Court.

124. The Supreme Court's misconstruction of this Court's findings was critical to its affirmance of defendant's death sentence and deprived defendant of his right to due process under the Fourteenth Amendment.

D. THIS COURT'S FAILURE TO OBSERVE THE STATUTORY REQUIREMENT THAT THE DEATH SENTENCE BE IMPOSED ONLY ON THE BASIS OF WRITTEN FINDINGS ENTERED AT THE CONCLUSION OF THE SENTENCING PROCEEDING DEPRIVED DEFENDANT OF DUE PROCESS

125. Section 921.141(3), Florida Statutes, provides in pertinent part:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with [Section] 775.082.

126. This Court sentenced defendant to death on September 30, 1975, but did not enter the "specific written findings of fact" required by Section 921.141(3).

127. Upon information and belief, the Florida Supreme Court, on February 23, 1977, sua sponte remanded this case to this Court so that the Court could enter the written findings required by statute.

128. Upon information and belief, the Court entered its findings on April 22, 1977, nearly 19 months after the conclusion of trial.

129. The delay in the entry of this Court's findings defeated the purpose of the statutory requirement of a written record of the sentencing court's reasoning prepared at the time of trial. The delay thereby hampered effective appellate review.

130. As discussed in Subpart C above, the Florida Supreme Court misinterpreted the finding of this Court on defendant's age as a mitigating circumstance. At the very

least, the delay in the entry of this Court's written findings created a substantial risk of such misinterpretation.

131. This Court's departure from the statutorily prescribed procedure for imposition of the death penalty deprived defendant of due process and could not be cured by the subsequent entry of written findings nearly 19 months after trial. Although Section 921.141(3) does not specify a time period during which the sentencing court's written findings must be entered, the statute plainly does not contemplate such a substantial delay as occurred in this case.

132. Especially in capital cases, applicable procedural guarantees must be scrupulously observed. The governing Florida statute was not followed in this case, and defendant's sentence of death therefore cannot stand.

E. THE FLORIDA SUPREME COURT ENGAGED IN AN IMPROPER EX PARTE CONSIDERATION OF MATERIALS OUTSIDE THE RECORD IN THE COURSE OF ITS REVIEW OF DEFENDANT'S CONVICTION AND SENTENCE

133. At the time defendant appealed his conviction and sentence to the Florida Supreme Court, that court was engaged in the regular practice of soliciting and receiving extra-record psychiatric, psychological, and other reports from state agencies concerning the mental condition and background of appellants under sentence of death. The practice was conducted in secret, without notice to the defendant or his lawyers, and without the sanction of any statutory authority or duly promulgated rule of procedure that might have notified the defendant or his lawyer even of the existence of the practice. See Affidavit of Mitchell Karlan in Brown v. Wainwright, attached as Exhibit B. Many

of the reports were later purged from the Court's files, making verification of individual instances of the practice difficult. On information and belief, the Florida Supreme Court requested and received such reports in defendant's case. See Item No. 84 and Item No. 8 in the two lists attached as Exhibit C.

134. The request and receipt by the Florida Supreme Court of undisclosed information in capital cases, as described above, violated, inter alia, defendant's rights under the Due Process Clause of the Fourteenth Amendment; the right to counsel guaranteed by the Sixth and Fourteenth Amendments; the right to a reliable and non-arbitrary determination of sentence required by the Eighth and Fourteenth Amendments; the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments; the right to confrontation guaranteed by the Sixth and Fourteenth Amendments; and the Equal Protection Clause of the Fourteenth Amendment.

135. The practice described above violated Gardner v. Florida, 430 U.S. 349 (1977). In Gardner, the Supreme Court held unconstitutional a death sentence imposed after the trial court ordered and relied on a pre-sentence investigation report, portions of which were not disclosed to the parties. The plurality emphasized that in capital cases, "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause" (id. at 358).

136. Because the Supreme Court in this case apparently considered materials outside the record, defendant is entitled to the same relief afforded in Gardner. His sentence of death should be vacated.

137. Recognizing that the issue presented in this Subpart is currently being litigated in several other cases and that the issue has not been decided by a federal appellate court, the Eleventh Circuit recently granted a stay of execution to another Florida inmate seeking post-conviction relief. Goode v. Wainwright, No. 82-5244 (Feb. 28, 1982), attached as Exhibit A. A stay should be granted in this case on the same reasoning outlined in Goode.

F. IN SENTENCING DEFENDANT TO DEATH, THIS COURT IMPROPERLY RELIED ON INFORMATION OUTSIDE THE RECORD

138. In sentencing defendant to death, this Court stated that it had the benefit of the jury's recommendation and that it "also had the benefit of its own knowledge of the entire trial, not only of Sampson Armstrong but of Jeanette Armstrong" (Tr. 1445).

139. The Court made a virtually identical statement in explaining its imposition of the death penalty on co-defendant Enmund (Tr. 1448).

140. In its written findings entered 19 months after trial at the behest of the Florida Supreme Court, this Court explicitly relied in part on what it knew "from the trial of Jeanette Armstrong" (399 So. 2d at 961).

141. On June 20, 1977, after receiving this Court's written findings, the Florida Supreme Court directed this Court to state whether, in imposing sentence, it had relied on any materials outside the record.

142. On June 27, 1977, contrary to its earlier statements, this Court disclaimed reliance on anything but the testimony at defendant's trial and at the advisory penalty proceeding.

143. Time constraints have precluded counsel from thoroughly examining the transcript of the trial in Jeanette Armstrong's case. There is no question, however, that Jeanette Armstrong was convicted of second-degree murder and that her statement inculpating herself, her husband, and co-defendant Enmund was introduced into evidence at her trial. This statement was not introduced at defendant's later trial.

144. On the basis of this Court's own contemporaneous statements, there is little doubt that the death sentence imposed on defendant was based in part on materials outside the record of his case.

145. The reasoning of Gardner v. Florida, supra, therefore requires that defendant's death sentence be vacated.

G. THE SENTENCING PROCEEDING IN THIS CASE DID NOT CONFORM TO THE REQUIREMENTS OF DUE PROCESS

146. The separate sentencing phase of the trial of defendant and co-defendant Enmund was started and finished in approximately one hour. It began at approximately 9:00 p.m. on September 30, 1975, immediately following the guilt phase of the trial.

147. This Court asked the jury whether it wished to proceed immediately to the penalty phase or whether it preferred to adjourn until the following morning. The jury, through its foreman, responded that it preferred to proceed immediately to the penalty phase (Tr. 1398-1400).

148. Counsel for defendant requested a pre-sentence investigation, but the Court proceeded immediately with the sentencing phase of trial (Tr. 1398).

149. The entire sentencing proceeding for both defendants is recorded in 52 pages of the trial transcript.

150. The taking of testimony, arguments of counsel, and instructions to the jury were completed in approximately half an hour. The jury deliberated for 31 minutes (Tr. 1438).

151. It is inconceivable that, with the death penalty at stake, the relevant aspects of the life and character of a single defendant could be adequately explored and presented to a jury in 30 minutes. Much less could the task be performed properly for two defendants within that time period. The outcome of the sentencing proceeding in this case was a foregone conclusion. The hour was late, and the jury was eager to finish its assignment. Defendant was denied the opportunity to gather evidence and witnesses that would have enabled him to present a more complete and more accurate picture of his character and background.

152. The sentencing proceeding therefore violated the constitutional protection against cruel and unusual punishment in the Eighth and Fourteenth Amendments and the constitutional guarantees of due process and equal protection of the laws in the Fourteenth Amendment.

H. DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PROCEEDING

153. Defendant's counsel presented only one witness at the sentencing proceeding, defendant's parole officer, Betty Fine.

154. Upon information and belief, counsel did not prepare any members of defendant's family to testify at the penalty phase.

155. Counsel presented no evidence of defendant's mental abilities, his poverty, his limited education, his illegitimacy, his separation from his parents when he was very young, his upbringing by his maternal grandmother, his work habits, his religious convictions or activities, his reasons for marrying Jeanette Armstrong, his current relationship with his family, or any of the other myriad factors that ought to be taken into account in any informed decision on the death penalty.

156. Counsel's failure to prepare such evidence and to present it at the penalty phase of trial denied defendant his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.

I. IMPOSITION OF THE DEATH PENALTY AGAINST DEFENDANT IS ARBITRARY AND CAPRICIOUS ON THE FACTS OF THIS CASE

157. The physical evidence presented at trial tended to show that Jeanette Armstrong was present at the Kerseys' house on the morning of the shooting. No physical evidence tended to show that defendant was there.

158. The eyewitness testimony of Willie Lee and two other State witnesses, Mary Gibbs (Tr. 778-785) and Robert Davis (Tr. 788-798), tended to show that Earl Enmund and Ida Jean Shaw drove to the Kerseys' house on the morning of April 1, 1975. No eyewitness testimony tended to show that defendant was at the Kerseys' house on April 1, 1975, or at any other time.

159. Defendant was convicted primarily on the basis of the self-interested testimony of his mother-in-law and his own alleged confession to J. B. Neal, a passing acquaintance

of no more than a year's standing who admitted his interest in the $1,000 reward offered by the Hardee County Sheriff.

160. Jeanette Armstrong was convicted of second-degree murder and sentenced to imprisonment. She will be eligible for parole in the relatively near future.

161. Ida Jean Shaw is completely free. She was given immunity in exchange for her testimony.

162. Defendant has been sentenced to death. Yet even if the most damaging testimony against him is true, he did not shoot anyone until he saw his own wife shot.

163. There is no evidence that defendant planned the robbery of the Kerseys or that he even knew them.

164. For the two male defendants in this case to be sentenced to death while Jeanette Armstrong serves a term of imprisonment and her mother walks free is a denial of defendant's right to due process and equal protection of the laws under the Fourteenth Amendment.

J. THIS COURT IMPROPERLY FAILED TO INSTRUCT THE JURY THAT IT COULD CONSIDER AGGRAVATING CIRCUMSTANCES ONLY IF PROVED BEYOND A REASONABLE DOUBT

165. The Due Process Clause requires that all elements of criminal offenses be proved beyond a reasonable doubt.

166. Under Florida law, the death sentence may be imposed only after a finding of one or more statutorily-prescribed aggravating circumstances.

167. Because, as a practical matter, at least one aggravating circumstance is an element of every capital offense in Florida, proof beyond a reasonable doubt is

required before any aggravating circumstance may be considered in support of the death penalty.

168. This Court failed to instruct the jury that aggravating circumstances must be proved beyond a reasonable doubt, and defendant's death sentence is therefore invalid.

II. INVALIDITY OF THE CONVICTION IN THIS CASE

A. THIS COURT INCORRECTLY REFUSED TO GRANT DEFENDANT'S MOTION FOR CHANGE OF VENUE

169. The Kersey shootings occurred in rural Hardee County, Florida, in which the population is predominantly white.

170. The shootings received substantial coverage in the local press, including grusome descriptions of the crime, references to the relationship between the alleged participants, and detailed accounts of the evidence at Jeanette Armstrong's trial.

171. In opposing bail before trial, the State Attorney relied on a law enforcement officer's remark that co-defendant Enmund's life "wouldn't be worth a plug nickel" if he were released. Because of the joint indictment of defendant and Enmund, it is reasonable to believe that this remark also described the hostility to defendant in Hardee County.

172. The Kerseys' were well-known in Hardee County, and their alleged assailants could not expect to get a fair trial there.

173. The jury's willingness to begin the sentencing phase of the trial late at night and its incredibly brief deliberations on the sentencing recommendation tend to show that the outcome of the trial was foreordained, or at least skewed in advance.

174. Defendant sought a change of venue before trial (R. 11-19, 316-318), and this Court denied the motion.

175. Under all the circumstances, the denial of the change of venue resulted in an unfair trial that denied defendant the due process guaranteed by the Fourteenth Amendment.

B. IDA JEAN SHAW SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY AS THE COURT'S WITNESS, SUBJECT TO UNLIMITED CROSS-EXAMINATION BY THE STATE

176. Ida Jean Shaw was an admitted liar who told a series of inconsistent stories before trial, each of them designed to absolve herself of responsibility for the shooting of the Kerseys.

177. Her pretrial statements, including statements under oath, were so unreliable that the State refused to call her as its own witness and, indeed, charged her with perjury.

178. By calling Shaw as the Court's own witness and questioning her directly at trial, the Court helped to legitimize her testimony in the eyes of the jury.

179. By permitting unlimited cross-examination of Shaw by the prosecutor, the Court unfairly permitted the State to have both the benefit of Shaw's testimony and the opportunity to ask leading questions about her inconsistent pretrial statements in an effort to make her story more plausible to the jury.

180. The probative value of Ida Jean Shaw's self-interested testimony was not sufficiently great to outweigh its enormous unfair prejudicial effect on defendant. Admission of the testimony under the Court's own imprimatur denied defendant a fair trial, in violation of his due process rights under the Fourteenth Amendment.

C. IDA JEAN SHAW SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY WHEN THE DISPOSITION OF PERJURY CHARGES AGAINST HER DEPENDED ON THE CONTENT OF HER TESTIMONY

181. When Ida Jean Shaw took the stand at defendant's trial, she had been granted immunity as to the events at the Kerseys' house on April 1, 1975, but she faced a perjury prosecution based on her allegedly false statements under oath in her pretrial deposition.

182. Shaw knew exactly what she had to say at defendant's trial in order to avoid a perjury prosecution. She had been promised that the prosecution would be dropped if she told "the truth" at trial, and she knew perfectly well that "the truth" did not mean one of her pretrial statements exculpating defendant. Rather, she was expected to exonerate herself and incriminate defendant by testifying that defendant and co-defendant Enmund returned to her house on the morning of April 1, 1975, with a wounded Jeanette Armstrong and that defendant subsequently made self-incriminating statements to her and distributed to her part of the proceeds of the alleged robbery.

183. Allowing Shaw to testify under these circumstances deprived defendant of due process, because the threatened perjury prosecution made the probability of falsehood unacceptably great.

D. THE PRECISE NATURE OF SHAW'S ARRANGEMENT WITH THE PROSECUTION SHOULD HAVE BEEN REVEALED TO THE JURY BUT WAS NOT

184. During her testimony at trial, Shaw first stated that she did not think she had been promised anything in exchange for her testimony (Tr. 954, 1002). Shaw then

testified that the prosecutor had told her she would not be prosecuted for murder if she told the truth at defendant's trial (Tr. 1002-1003).

185. At no time was it fully and clearly explained to the jury that Shaw had already been granted transactional immunity from prosecution for murdering or robbing the Kerseys, that perjury charges were pending against her based on her pretrial statements, and that those charges too would be dropped if she told "the truth" at trial.

186. Even assuming it was permissible to call Shaw as the Court's witness, it was incumbent on the Court and the State to ensure that the precise nature of Shaw's position be revealed to the jury. Only in this way could the jury fairly evaluate Shaw's testimony.

187. The failure to explain accurately Shaw's deal with the prosecution deprived defendant of due process, because it made critical testimony seem substantially more reliable than it was.

E. THE JURY THAT CONVICTED DEFENDANT WAS NOT SELECTED FROM A FAIR CROSS-SECTION OF THE POPULATION

1. The Jury was Selected in a Manner that Under-Represented Blacks

188. Defendant was convicted by an all-white jury.

189. According to the 1970 census, the population of Hardee County in the age group 18-and-over was approximately 8 percent black. 1970 Census of the Population, Vol. I: Characteristics of the Population, Part 11: Florida, Table 35, at 11-162 (1973).

190. The omission of blacks from the trial jury suggests that the jury was selected in a manner not adequate to ensure a fair cross-section of the population.

191. Particularly in a case that was widely publicized and that involved black defendants charged with the murder of a white couple, adherence to the fair cross-section requirement was essential to a fair trial.

192. Defendant was denied his rights under the Sixth and Fourteenth Amendments because the trial jury was not drawn from a fair cross-section of the population.

2. The Jury was Selected in a Manner that Under-Represented Women

193. Defendant was convicted by a jury of nine men and three women (Tr. 1393-1394, 1439-1441).

194. According to the 1970 census, the population of Hardee County in the age group 18-and-over was approximately 50 percent female. 1970 Census of the Population, Vol. I: Characteristics of the Population, Part 11: Florida, Table 35, at 11-162 (1973).

195. Moreover, at the time of defendant's trial, Section 40.01(1), Florida Statutes, provided that "expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand and petit jury duty." (A similar provision is now contained in Section 40.013(4), Florida Statutes.)

196. The number of women on the trial jury and the statute cited in the preceding paragraph show that the jury was selected in a manner not adequate to ensure a fair cross-section of the population.

197. The petit jury at petitioner's trial was invalidly selected under the Supreme Court's decisions in Duren v. Missouri, 99 S. Ct. 664 (1979), and Taylor v. Louisiana, 419 U.S. 522 (1975). The Florida statute cited in paragraph 195 is invalid under the Sixth and Fourteenth Amendments.

198. For these reasons as well, defendant was denied his right under the Sixth and Fourteenth Amendments to a jury drawn from a fair cross-section of the population.

F. DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF TRIAL

199. Defendant's counsel at trial fell considerably short of the minimum standard of effective representation required by the Sixth and Fourteenth Amendments.

200. Among the deficiencies of defense counsel at the penalty phase were the following:

(a) He failed in several ways adequately to impeach the critical witness J. B. Neal. For example, he did not ask Neal to explain or the jury to consider how defendant could have confessed to Neal in Lake Placid at 11:00 a.m. or 11:30 a.m. on April 1, 1975, when Detective Goodson interviewed defendant at the hospital in Avon Park between 10:30 a.m. and 10:45 a.m., and defendant then supposedly rode back to Wauchula with co-defendant Enmund and Ida Jean Shaw, making an incriminating statement along the way.

(b) He failed to impeach Neal by pointing out the inconsistency between the statement in defendant's alleged confession that Jeanette Armstrong was shot outside the Kersey house and the discovery of a

blood stain inside the house, the blood type of which matched Jeanette Armstrong's blood type.

(c) He failed to impeach Neal with the direct contradiction between his trial testimony that he did not drive defendant to Wauchula on April 1, 1975, and his deposition testimony that he did.

(d) He failed to object to the critical hearsay testimony of the Kerseys' son Earl, who testified that his father told him the day before the shootings that he, the elder Kersey, had $1,400 or $1,500 (Tr. 765). This testimony was crucial to the State's proof of the predicate felony of robbery, because it was the only evidence that the elder Kersey had a large quantity of money at any time later than several weeks before the shooting. The testimony of Earl Kersey was pure hearsay and would have been excluded on proper objection.

(e) He failed to impeach Ida Jean Shaw concerning the number of guns she disposed of. This number was critical because it emphasized the irreconcilable inconsistencies between the testimony of Neal and that of Betty Wilson. If Eunice Kersey shot Jeanette Armstrong with a .38 caliber gun and if the Kerseys were shot with the gun used by Eunice Kersey, as Betty Wilson testified, then they were not also shot with a gun already held on Thomas Kersey by defendant at the time Jeanette was shot, as Neal testified, and with another gun belonging to Ida Jean Shaw or to one of the Armstrongs. The ballistics evidence at trial gave no indication that the Kerseys were shot with more than one .38 caliber weapon.

(f) He failed to impeach Willie Lee by reference to his prior conviction and his enormous outstanding debt.

(g) He failed adequately to investigate the case in order to substantiate further defendant's alibi defense.

201. The foregoing is not an exhaustive list of the deficiencies of defense counsel at trial, but it is sufficient to demonstrate that there was a substantial problem that should be investigated further in an evidentiary hearing.

G. THIS COURT IMPROPERLY FAILED TO SEVER THE TRIALS OF DEFENDANT AND CO-DEFENDANT ENMUND

202. Defendant sought to sever his trial from that of co-defendant Enmund (R. 319-320). This Court denied the motion (Tr. 175).

203. The denial of the motion was improper and prejudicial, because it forced defendant to appear before the jury together with a co-defendant who was identified by an eyewitness on the morning of April 1, 1975, who had a pre-existing reason to believe that Thomas Kersey might be carrying a large amount of money, and whose car was allegedly seen at the Kerseys' house on the morning of April 1.

204. Moreover, defendant and co-defendant Enmund were antagonistic toward each other, and the joint trial permitted the introduction of evidence, such as the testimony of the Hardee County Sheriff regarding the pretrial statements of co-defendant Enmund (Tr. 1128-1138), that would not have been admissible against defendant had he been tried alone.

205. The denial of the motion to sever therefore denied defendant his due process rights under the Fourteenth Amendment.

H. THIS COURT IMPROPERLY PREVENTED THE INTRODUCTION OF EVIDENCE THAT MAY HAVE BEEN EXCULPATORY

206. Defense counsel at trial offered into evidence a letter sent to defendant by his wife when both were incarcerated in the late spring or summer of 1975 (Tr. 1180). Defense counsel stated that the letter "could obliterate the testimony of Ida Jean Shaw in her deposition under oath" (Tr. 1182).

207. This Court announced that it had "grave doubts about this piece of evidence," and the Court "caution[ed] all parties regarding their ethical responsibility and also the responsibility of the individual who is offering that piece of evidence in a case of this magnitude" (Tr. 1182).

208. Defense counsel, in response to the Court's remarks, withdrew the proffered item of evidence.

209. The Court's action chilled the presentation of defendant's case and improperly denied him the use of evidence that may have been helpful.

210. Defendant thus suffered a denial of his due process rights under the Fourteenth Amendment.

OTHER REQUIRED INFORMATION

211. The grounds for relief involving the testimony of Ida Jean Shaw, the deal between Ida Jean Shaw and the State, the Court's exclusion of arguably exculpatory evidence, and the impropriety of the death penalty under all the circumstances were presented on direct appeal. The other

grounds for relief apparently were not raised on direct appeal, either because they are based on facts outside the trial and appellate record, or because they arose as a result of the Florida Supreme Court's decision, or because they were not preserved due to the ineffectiveness of trial or appellate counsel.

212. Defendant has no petition, application, appeal, motion, or any other pleading now pending in any court, state or federal, concerning the judgment in this case.

213. The attorney who represented defendant at trial and during most of the pretrial proceedings was:

Jon H. Anderson
Lane, Trohn, Bertrand & Williams, P.A.
202 East Walnut Street
P. O. Drawer J
Lakeland, Florida 33802

At the time of trial, Mr. Anderson's address was:

P. O. Box 488
Lake Placid, Florida 33852

The attorney who represented defendant on direct appeal to the Florida Supreme Court was:

Robert E. Pyle
P. O. Box 557
Lake Alfred, Florida 33850

For brief periods after his arrest and after his conviction, defendant was represented by the Public Defender for the Tenth Judicial Circuit and, in particular, by Assistant Public Defender Val Patarini. The attorneys representing defendant in the current post-conviction proceedings are listed on the final page of this motion.

PRAYER FOR RELIEF

WHEREFORE, defendant Armstrong prays:

1. That this Court forthwith issue an order staying his execution pending final disposition of this matter and further order of this Court;

2. That the State of Florida be required to appear and answer the allegations of this motion;

3. That the defendant be accorded an evidentiary hearing on the allegations of this motion, at which he is present;

4. That, after full hearing, defendant be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

5. That defendant, who is indigent, be granted sufficient funds to secure expert testimony and other testimony necessary to prove the facts as alleged in his motion;

6. That defendant be granted the authority to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts as alleged in the motion;

7. That defendant be allowed a period of ninety days, which period shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised by this motion;

8. That defendant be allowed to amend this motion up to and including the commencement of the hearing requested herein; and

9. That defendant be allowed such other, further, and alternative relief as may seem just, equitable, and proper under the circumstances.

March 23, 1982

Respectfully submitted,

PETER BUSCEMI
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 822-1843

ROBERT YOUNG
123 Avenue C, S.W.
P. O. Box 1151
Winter Haven, Florida 33880

ATTORNEYS FOR DEFENDANT

VERIFICATION

STATE OF FLORIDA :
COUNTY OF ~~BRADFORD~~ HARDEE : SS:

Before me, the undersigned authority, personally appeared Sampson Armstrong who, being first duly sworn, says that he has personal knowledge of the allegations in the foregoing Motion to Vacate, Set Aside, or Correct Conviction and Sentence and that the allegations and statements contained therein are true and correct to the best of his knowledge.

SAMPSON ARMSTRONG

Subscribed and sworn to before me this 22nd day of March, 1982.

NOTARY PUBLIC

Notary Public, State Of Florida At Large
My Commission Expires Feb. 4 1985
Bonded By Lawyers Surety Corp.

My commission expires:

PUBLISH

EXHIBIT A

[Godbold]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5244

ARTHUR F. GOODE, III,

Petitioner-Appellant.

versus

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and C. S. STRICKLAND, Superintendent, Florida State Prison at Starke, Florida,

Respondents-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

Before GODBOLD, Chief Judge, JOHNSON and ANDERSON, Circuit Judges.

GODBOLD, Chief Judge:

Petitioner is under sentence of death in Florida for first degree murder and is scheduled to be executed March 2, 1982, pursuant to a death warrant signed by the Governor of Florida on February 5, 1982.

The United States District Court for the Middle District of Florida denied a writ of habeas corpus February 25, 1982, granted a certificate of probable cause for appeal, and denied a stay of execution. Petitioner appealed to this court the same day and moved for a stay of execution.

Under the law of our country petitioner given the right to seek review in the federal courts of claims based upon our national Constitution and arising from his state court conviction. If he is denied relief in the federal district court the law gives him the right to appeal.

There are sharply differing views over whether our law ought to provide that one convicted of crime in state court may obtain a second "collateral" review in federal courts of constitutional issues arising from his conviction. But the law of our country does provide for it, and federal court judges take an oath to carry out that law.

The petitioner has not abused the processes that our law makes available to him in the federal courts. His claims could not be presented in federal court until they had been presented to and denied by the courts of Florida; some were finally denied in state court litigation as late as November 1981,[1/] while

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1/ When the Supreme Court of the United States denied certiorari in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, ____ U.S. ____, 70 L.Ed.2d 407 (1981).

---

others were denied as late as February 23, 1982. Petitioner filed his federal petition for habeas corpus in the Middle District of Florida on February 16, eleven days after the death warrant was signed. The district court conducted a non-evidentiary hearing February 23, and on February 25 issued a 25-page opinion denying the writ, granting a certificate that there was probable cause for appeal, and denying a stay of execution.[2/]

2/ Petitioner had filed a petition with the Supreme Court of Florida on February 11 based on federal constitutional grounds not previously presented to the state courts. That court denied this petition, with an opinion, on February 23, the same day the federal district court was conducting its hearing and two days before the district court rendered its decision.

The same day, February 25, petitioner appealed to this court. Appeal papers reached the members of the panel February 26.

The appeal to this court is not frivolous. Several of the issues raised are substantial. One of the issues is a serious and difficult one, namely, whether the Supreme Court of Florida, in reviewing petitioner's appeal from conviction, violated due process under the United States Constitution by receiving and considering psychological screening information concerning petitioner that was not a part of the record before it.[3/]

3/ This point was raised in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). We neither indicate nor imply any view on the merits of the point, but only note that it is a substantial issue. The Supreme Court denied certiorari, ___ U.S. ___, 70 L.Ed.2d 407 (1981), but two justices dissented from the denial, saying:

> I believe that the Florida court's ex parte consideration of such nonrecord evaluative data relating to individual appellants during the court's review is questionable as a matter of due process and is inconsistent with this Court's past insistence on strict procedural regularity in the imposition and review of capital sentences. See Gardiner v. Florida, 430 U.S. 349, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977). Moreover, much of the information appears to be inadmissible and unreliable hearsay, which petitioners should at least have the opportunity to cross-examine. Some may be inadmissible under this Court's recent decision in Estelle v. Smith, ___ U.S. ___, 68 L.Ed.2d 359, 101 S.Ct. 1866 (1981). Accordingly, I dissent.

Id. at 408.

This issue has been raised in other Florida cases and has been decided by federal district courts in Florida but not by any federal appellate court. It is now pending before this court in a Florida case, Ford v. Wainwright, No. 81-6200 (11th Cir., filed Dec. 7, 1981) (on appeal from S.D. Fla.), an expedited case that was orally argued and submitted for decision in this court February 9, 1982. Possibly the district judge was not made aware of the status of the Ford appeal. However, in deciding the issue we have described the district judge relied upon and specifically adopted the decisions on the same issue in two other cases from federal district courts in Florida, Witt v. Wainwright, No. 80-545 (memorandum opinion, M.D. Fla., May 14, 1981), appeal pending, No.

81-5750 (11th Cir.), and Foster v. Wainwright, 517 F.Supp. 597, 607 (N.D. Fla. 1981), appeal pending, No. 81-5734 (11th Cir.). Witt is from the same court as the present case, the Middle District of Florida. Both Witt and Foster have been on appeal to this court for several months, have been consolidated for consideration, and briefs have been filed in one and briefing is in process in the other.[4/] The district court erred in denying

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4/ Moreover, the same issue is pending in this court in Dobbert v. Strickland, No. 82-5121, also from the Middle District of Florida, in which on February 1 this court had entered an order granting a stay and expediting the case for oral argument.

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a stay when the very decisions on which it based its determination of this issue were pending on appeal.

Petitioner was convicted of a horrifying murder. Nevertheless, the law requires that his trial and appeal comply with the Constitution of the United States, and when the matter is properly presented to us -- as it is in this case, by assertion of non-frivolous issues that are not foreclosed by the state court processes -- the law requires us to examine to see whether his trial and appeal did measure up to constitutional standards.

The motion for a stay of execution must be, and is, GRANTED. The case will be expedited.

EXHIBIT B

IN THE SUPREME COURT OF FLORIDA

JOSEPH GREEN BROWN, et al., Petitioners	)	
v.	)	Case No. 59,732
LOUIE WAINWRIGHT, Secretary Department of Corrections, State of Florida, Respondent	)	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Mitchell A. Karlan, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York and am associated with the firm of Debevoise, Plimpton, Lyons and Gates. I am one of the counsel for John W. LeDuc, a petitioner herein.

2. In April 1980, I visited the office of the Clerk of this Court to review the file of State v. LeDuc, No. 47,953 ("LeDuc"). In that case, this Court affirmed the convictions of first degree murder and involuntary sexual battery and sentences of death issued by the Circuit Court of Okaloosa County. At that time I was shown a portion of this Court's file which I was informed was public. I was informed that there was another portion which was not public, and which I could not review. I was informed that it contained draft opinions by the Justices and memoranda among them.

3. On Tuesday, October 28, 1980, I again visited the Clerk's office and reviewed a handwritten docket sheet

for LeDuc. I was informed by Ms. Kay Yent, an employee of the Clerk's office who was assisting me in my review of the file, that I could not examine the reverse side of this docket sheet as it contained non-public information.

4. I asked Ms. Yent to describe the type of information recorded on the reverse side of this docket sheet and she responded that she was unable to explain it to me. She suggested that I speak with Florida Supreme Court Clerk, Sid J. White, who might offer a full explanation.

5. On Tuesday, October 28, 1980, I met with Mr. White in his office in the Florida Supreme Court Building.

6. During my conversation with Mr. White, he had the LeDuc docket sheet before him. He reviewed the non-public side of the sheet and explained that it recorded (a) the date on which the file had been reviewed by any of the Justices of this Court, (b) the date on which the file had been returned to the Clerk's office, and (c) the Justice who authored the per curium opinion in LeDuc's case.

7. Mr. White then stated that the docket sheet also revealed that a psychological screening report, dated August 1975, had been removed from the LeDuc file on the 28th of October, the day on which we met.

8. I asked Mr. White whether this report had been removed from the public or the non-public portion of the LeDuc file. He stated that it had been removed from the non-public portion. I asked whether or not the receipt of

such a document would be recorded on either side of the docket sheet. He responded that it might not be and that, in the instant case, it had not been. Mr. White stated that no letter requesting the report was found in the file, and that, based upon his experience, someone must have telephoned and requested that it be transmitted to the Court.

9. I asked Mr. White what had prompted the review of the LeDuc file and removal of the report from that file. Mr. White stated that, when the petition herein was filed, a review of the files of all capital punishment cases was initiated to determine whether documents which were not a part of the record in the trial court had been received.

10. I asked Mr. White whether, as Mr. LeDuc's attorney, I would have been notified of the discovery of this report in his file. He responded that I would not have been. He agreed that had I not inquired as to the content of the non-public side of the docket sheet I might never have known of the report's presence in the file.

11. On Wednesday, October 29, 1980, I again met with Mr. White in his office. I showed him a copy of the one page psychological screening report attached as Exhibit A and asked whether it was the report referred to in paragraph 7 of this affidavit. I had received a copy of Exhibit A from the Florida Parole and Probation Commission as part of their submission to the Govenor and Cabinet of Florida prior to LeDuc's executive clemency proceeding. The report sent to me by the Parole and Probation Commission was part

of a packet of documents stamped "Confidential". Mr. White took my copy of Exhibit A and left the room briefly. He returned and stated that the document I showed him was identical to the document which had been removed from the file on the 28th.

12. I inquired whether the copy found in the LeDuc file had any notations to indicate the date on which it had been received by this Court. He stated that it did not.

Mitchell A. Karlan

Sworn to before me this
14 day of November, 1980

Notary Public

DEPARTMENT OF OFFENDER REHABILITATION
FLORIDA STATE PRISON
P. O. BOX 747
STARKE, FLORIDA
32091

-101a-

PSYCHOLOGICAL SCREENING REPORT

DATE August 15, 1975

NAME LeDuc, John NUMBER 047873 AGE 29 RACE White

OFFENSE First Degree Murder SENTENCE Death

TEST MMPI, HTP IQ 95/100 INTELLIGENCE Average

EDUCATION: (verified: yes__ no X) GRADE COMPLETED 11th COLLEGE AGE__

REASON FOR NOT COMPLETING EDUCATION Committed to Mental Institution

LITERACY: Reading Level 8.0 - 9.0 Relative Grade 8.5

VOCATION: (unverified)

PRESENT INTEREST Religion and Reading

SPECIAL DIFFICULTIES Subject has a history of sexual deviance with paranoid, antisocial tendencies and psychotic behavior.

PSYCHOLOGICAL OBSERVATIONS:

ohn LeDuc, 047873, a twenty-nine year old caucasian male appeared at the interiew adequately dressed and reasonably clean although unshaven. The subject spoke ationally though he admitted hallucinatory experiences and prior commitment to mental institution for the theft of women's undergarments. The subject is rom an alcoholic, broken home and related unusual experiences of his mother aking him to motels to witness his father's marital transgressions with various omen. The subject further related experiences where his mother had extra arital relationships with his knowledge of her actions. The subject stated he ad one love affair which failed, a history of people bullying him and a desire o be left alone, isolated from family and friends. He reported having no riends or relationships with people who did not lie or beat him up. When uestioned as to what actions the subject took to the beatings the reply was lways negative stating pacifism. The subject further stated that he was a devote hristian, a reformation that took place immediately after the instant offense.

sychological testing revealed abnormally high, critical elevations in the depression, suicidal, hallucinatory, sexual and somatic scales on the MMPI. Projective tests revealed an overcontrolled attempt to appear normal. The subject ttempts to structure relationships especially in heterosexual sphere. As indicated by the HTP test the subject has a low threshold for criticism, a stunted ery retarded ability for relationships which involve emotional attachment. A ombined analysis of these psychometric operations, reveal an individual with ross depression and inferiority feelings. In social situations he is often ikely to structure the entire interaction and could, if the interaction did not ollow his predicted outcome react in a violent antisocial way. Following failure he subject views himself as inferior and withdrawn. Responses on the MMPI rofile indicated the subject could be considered suicidal.

RECOMMENDATIONS:

ue to the nature of the sentence, i.e. death, the subject is being referred to he appropriate staff psychologist who will continue counseling the subject.

aul C. Decker
sychologist

PCD:gp

cc: Department of Offender Rehabilitation
Parole and Probation Commission
Inmate Master File
Department File

Exhibit A

EXHIBIT C

Supreme Court of Florida

Tallahassee 32301

WHITE
CLERK
SID L. SMILLEY
CHIEF DEPUTY CLERK

TELEPHONE
904-488-0125

October 3, 1980

George R. Georgieff, Esquire
Assistant Attorney General
The Capitol
Tallahassee, Florida 32301

Re: Joseph Green Brown, et al. vs. Louis L. Wainwright, etc.
Case No. 59,732

Dear George:

Pursuant to your request I have enclosed herewith a list of all the cases involved in Brown v. Wainwright, indicating whether or not we received any post-sentence reports.

If there is any additional information you need, please let us know.

Most cordially,

Sid J. White
Clerk Supreme Court

SJW:dec
Enclosures

1. JOSEPH GREEN BROWN - $46,925
psychological evaluation received on 5/13/77

2. ALVIN BERNARD FORD - $47,059
none received

3. JESSIE RAY RUTLEDGE - $48,801
none received

4. CARL ELSON SERINER - $51,749
none received

5. DANIEL MORRIS THOMAS - $51,692
none received

6. AUBREY DENNIS ADAMS, JR. - $56,134
none received

7. FRED LYMAN BRUMBLEY - $56,006
none received

8. DANIEL L. COLER - $54,250
none received

9. VERNON RAY COOPER - $45,966
none received

10. GREGORY SCOTT ENGLE - $57,708
none received

11. DAVID LIVINGSTON FUNCHESS - $47,828
none received

12. ROBERT D. KEINEY - $56,778
none received

13. MARVIN E. JOHNSON - $56,167
none received

14. LESLIE R. JONES - $56,199
none received

15. ROBERT F. LEWIS - $50,851
psychological screening report received on 8/29/77
letter from the Department of Offender Rehabilitation with
a copy of a psychologist's letter dated 8/22/77 received
in this office on 9/8/77

16. BOBBY EARL LUSK - $59,146
none received

17. THOMAS McCAMPBELL - $57,026
none received

18. CHARLES DWIGHT MESSER - $49,780
psychiatric evaluation received on 4/19/77
trial court shall hold a further hearing (6/5/80)

19. FLOYD MORGAN - $54,939
none received

20. DONALD PERRY - $53,003
none received

21. JAMES LEROY PHIPPEN - $54,664
none received

22. JAMES DAVID RAULERSON - $47,991
none received

23. JIMMIE LEE SMITH $55,961
none received

24. WILLIAM GILVIN - $58,743
none received

25. BRYAN JENNINGS - $59,299
none received

26. RICHARD KING - $59,464
none received

27. GREGORY MILLS - $59,140
none received

28. ROBERT LEWIS BUFORD - $54,010
none received

29. WILLIAM CHRISTOPHER - $55,698
none received

30. RAYMOND ROBERT CLARK - $52,716
none received

31. ROBERT COMBS - $59,425
none received

32. RAYMOND L. DRAKE - $54,580
none received

33. EARL ENMUND - $48,525
psychological screening report received on 11/2/76

34. WILLIAM JENT - $58,744
none received

35. AMOS LEE KING - $52,185
none received

36. HAROLD G. LUCAS - $51,135
psychiatric evaluation received on 10/27/77
remanded for resentencing

37. ANTHONY RAY PEEK - $54,226
none received

38. RALEIGH PORTER - $55,841
none received

39. M. C. RUFFIN - $55,684
none received

40. DONALD WALSH - $59,512
none received

41. JOHNNY PAUL WITT - $45,796 & 58,329
none received

42. STEVEN BEATTIE - $56,569
none received

43. McARTHUR BRIEDLOVE - $56,811
none received

44. ALONZO BRYANT - $53,230
none received

45. BOBBY MARION FRANCIS - $50,127
psychological evaluation received on 2/23/78

46. MARVIN FRANCOIS - $54,461
none received

47. LENSON HARGRAVE - $48,135
none received

48. RONALD JACKSON - $47,269
none received

49. ANTONIO MENENDEZ - $49,294
psychological screening report received on 1/10/77
remanded for resentencing

50. THOMAS PERRI - $57,142
none received

51. LEON SCOTT - $56,419
none received

52. ROY STEWART - $7,971
none received

53. MERLE STURDIVAN - $59,416
none received

54. GARY TRAWICK - $57,077
none received

55. MANUEL VALLE - $54,572
none received

56. JAMES ADAMS - $45,450
none received

57. LEVIS LEON ALDRIDGE - $46,958
none received

58. ALLEN L. ANDERSON - $52,771
none received

59. DAVID ROSS DELAP - $56,235
none received

60. WILLIAM DUANE ELLEDGE - $52,272
None received

61. GEORGE VICTOR FRANKLIN - $52,971
none received

62. WILLIAM LANAY HARVARD - $47,052
psychiatrist's exam received on 1/13/76
psychological screening report received on 1/20/76

63. JAMES E. HITCHCOCK - $51,108
none received

64. MONROE HOLMES - $48,392
psychological report received on 6/8/76

65. JOHN P. MAGGARD - $51,614
none received

66. NOLLIE LEE MARTIN - $55,716
none received

67. WINDFORD MINES - $50,996
none received

68. ELDRED LONNIE MOODY - $52,907
none received

69. JAMES A. MORGAN - 53,418
none received

70. TOMMY LEE RANDOLPH - $54,869
none received

71. JAMES FRANKLIN F . - $51,724
none received

72. PAUL WILLIAM SCOTT - $58,588
none received

73. WILLIE CLAYTON SIMPSON - $49,681
none received

74. TERRY MELVIN SIMS - $57,510
none received

75. HENRY PERRY SIRECI, JR. - $50,905
none received

76. JOSEPH ROBERT SPAZIANO - $50,250
none received

77. JESSE JOSEPH TAFERO - $49,535
none received

78. SOLOMON WEBB - $58,306
none received

79. WILLIAM GLENN WELTY - $55,497
none received

80. WILLIAM MELVIN WHITE - $55,875
none received

81. GARY ELDON ALVORD - $45,542 & 57,810
none received

82. ANTHONY ANTONE - $50,240
psychological screening report received on 3/16/77

83. LUIS CARLOS ARANGO - $59,678
none received

84. SAMPSON ARMSTRONG - $48,516
psychological screening report received on 11/2/76

85. ELLWOOD BARCLAY - $47,260
psychological report received on 6/8/76 (Dougan also)

86. RICHARD BLAIR - $58,072
none received

87. BERNARD BOLANDER - $59,333
none received

88. STEPHEN TODD BOCKER - $55,568
none received

89. THEODORE BUNDY - $57,772
none received

90. JOHNNY COPELAND - $57,788
none received

91. PRESTON CRUM - $57,487
none received

92. WILLIE JASPER DARDEN - $45,056 & 45,108
none received

93. BENNIE DEMPS - $54,249
none received

94. ERNEST JOHN DOBBERT - $45,558
none received

EDWARD VIRGIL DOUGLAS - $44,864
none received

96. JOHN E. FERGUSON - $55,137 & 55,498
none received

97. CHARLES KENNETH FOSTER - $48,380
psychological screen report received on 6/9/76

98. ARTHUR F. GOODE, III - $51,480 & 59,453
psychiatric exam received 12/9/77

99. FREDDIE LEE HALL - $54,423 & 54,561
none received

100. CARL JACKSON - $48,165
none received

101. ELIGAAH ARDALLE JACOBS - $49,345
psychological screening report received on 11/29/76

102. THOMAS KNIGHT - $47,599
none received

103. JOHN WALLACE LeDUC - $47,953
none received

104. PAUL EDWARD MAGILL - $51,699
psychological screening report received on 6/6/78
appellant filed Motion to Inspect and Copy Psychological Screening Report and Presentence Investigation Report on 6/21/78 which was granted on 6/23/78
psychological screening report was returned to the Department of Offender Rehabilitation on 7/10/78
conviction affirmed, remanded to trial judge for further proceedings

105. ROY McKENNON - $54,172
none received

106. DOUGLAS RAY MEEKS - $47,533 & 48,080
Case No. 47,533 - psychological screening report received on 3/30/76
psychiatric exam reports received 3/31/76
Case No. 48,080 - psychiatric exam reports received on 3/31/76

107. MARK MIKELAS - 49,928
psychological screening report received 1/10/77
remanded for resentencing

108. EDDIE ODOM - $50,575
none received

109. TIMOTHY PALMES - $52,045
none received

110. CHARLES W. PROFFITT - $45,541
none received

111. MICHAEL SALVATORE - $48,513
psychological screening report received 4/14/76

112. FRANK SMITH - $57,743
no psychological evaluation received
post-sentence investigation was received on 8/21/80 and returned to the Offender Intake & Investigation Program Administrator of the Department of Corrections on 8/25/80

113. CARL RAY SONGER - $45,584 & 52,642
no psychological evaluation received
a post-sentence investigation was received on 1/23/78 and was returned to the Parole and Probation Commission on 5/9/78

114. WALTER STEINHORST - $55,087
none received

115. RUFUS STEVENS - $57,738
none received

116. RAYMOND R. STONE $48,275
psychological screening report received on 5/19/76

117. RONALD STRAIGHT - $52,460
none received

118. ROBERT A. SULLIVAN - $44,750
none received

119. WILLIAM LEE THOMPSON - $55,697
none received

120. CHARLES VAUGHT - $52,835
none received

121. DAVID L. WASHINGTON - $50,832; 50,833 & 50,850
none received

122. JAMES BUFORD WHITE - $54,292
none received

123. WARDELL RILEY - 49,666
none received

BROWN V. WAINWRIGHT, CASE NO. 59,722

1. AUBREY DENNIS ADAMS - #56,134
no record of ever requesting or receiving

2. JAMES ADAMS - #45,450
no record of ever requesting or receiving

3. LEVIS LEON ALDRIDGE - #46,958
no record of ever requesting or receiving

4. GARY ELDON ALVORD - #45,542 & 57,810
no record of ever requesting or receiving

5. ALLEN LEROY ANDERSON - #52,771
no record of ever requesting or receiving

6. ANTHONY ANTONE - #50,240
no request docketed but there is a letter requesting in the file dated 3/4/77; psychological screening report received on 3/16/77 and pulled from file on 9/17/80 and placed in vault downstairs in Mr. White's custody

7. LUIS CARLOS ARANGO - #59,678
no record of ever requesting or receiving

8. SAMPSON ARMSTRONG - #48,516
no record of ever requesting on docket sheet but there is a card in the file stating the psychiatric report was requested on 11/1/76; psychological screening report docketed as being received on 11/2/76 but not in the file now

9. ELWOOD CLARK BARCLAY - #47,260
no record of ever requesting on docket sheet but there is a card in the file stating that the psychiatric report was requested on 6/7/76; psychological report was received on 6/8/76 and was pulled from file on 10/8/80 and placed downstairs in vault in Mr. White's custody

10. STEPHEN WILLIAM BEATTIE - #56,569
no record of ever requesting or receiving

11. RICHARD D. BLAIR - #58,072
no record of ever requesting or receiving

12. BERNARD BOLENDER - #59,333
no record of ever requesting or receiving

13. STEPHEN TODD BOOKER - #55,568
no record of ever requesting or receiving; there are some psychiatric reports in the file which are sealed and are a part of the record

14. MacARTHUR BREEDLOVE - #56,811
no record of ever requesting of receiving

15. JOSEPH GREEN BROWN - #46,925
no request docketed but there is a letter of request dated 5/11/77; psychological evaluation received on 5/13/77 but is not in the file

16. FRED LYMAN BRUMBLEY - #56,006
no record of ever requesting or receiving

17. ALONZO BRYANT - #53,230
no record of ever requesting or receiving

18. ROBERT LEWIS BUFORD - #54,010
no record of ever requesting or receiving

19. THEODORE ROBERT BUNDY - #57,772 & 59,128
no record of ever requesting or receiving

20. WILLIAM D. CHE[illegible]OPHER - $55,698
no record of ever requesting or receiving

21. RAYMOND ROBERT CLARK - $52,716
no record of ever requesting or receiving

22. DANIEL LOWELL COLER - $54,250
no record of ever requesting or receiving

23. ROBERT IKE COMBS - $59,425
no record of ever requesting or receiving

24. VERNON RAY COOPER - $45,966
no record of ever requesting or receiving

25. JOHNNY COPELAND - $57,788
no record of ever requesting or receiving

26 PRESTON JUNIOR CRUM - $57,788
no record of ever requesting or receiving

27. WILLIE JASPER DARDEN - $45,056 & 45,108
no record of ever requesting or receiving

28. DAVIS ROSS DELAP - $56,235
no record of ever requesting or receiving

29. BENNIE DEMPS - $54,249
no record of ever requesting or receiving

30. ERNEST JOHN DOBBERT, JR. - $45,558
no record of ever requesting or receiving

31. HOWARD VIRGIL LEE DOUGLAS - $44,864
no record of ever requesting or receiving

32. RAYMOND LEE DRAKE - $54,850
no record of ever requesting or receiving

33. WILLIAM DUANE ELLEDGE - $52,272
no record of ever requesting on docket sheet or in file; there is a note in the file stating that no psychiatric exam was done ?

34. GREGORY SCOTT ENGLE - $57,708
no record of ever requesting or receiving

35. EARL ENMUND - $48,525
no record of ever requesting on docket sheet or in file; psychological screening report was received on 11/2/76 but is not in the file now

36. JOHN ERROL FERGUSON - $55,137 & 55,498
no record of ever requesting or receiving; post-sentence investigation was received 9/10/79 and was pulled from file on 10/13/80 and placed in vault downstairs in Mr. White's custody

37. ALVIN BERNARD FORD - $47,059
no record of ever requesting or receiving

38. CHARLES KENNETH FOSTER - $48,380
no record of request on docket or in file; psychological screening report received on 6/9/76 but not in file now; there are 3 letters from psychologists addressed to the trial judge which are in the file and are dated prior to sentencing

39. BOBBY MARION FRANCIS - $50,127
no record of ever requesting on docket sheet but there is a letter of request in the file dated 2/10/78; there is a psychological evaluation docketed as being received on 2/21/78 which is a post-sentence investigation and was returned to the Florida Parole and Probation Commission on 6/20/78; there was a psychological evaluation which is not on the docket sheet but was received on 4/3/78 and pulled from file on 10/9/80 and placed downstairs in vault in Mr. White's custody

40. MARVIN FRANCOIS - #54,461
no record of requesting or receiving

41. GEORGE VICTOR FRANKLIN - #52,971
no record of ever requesting or receiving

42. DAVID LIVINGSTON FUNCHESS - #47,828
no record of ever requesting or receiving; there is a letter (psychiatric evaluation) which was done 4/24/75 in the file and was ordered done by the trial judge

43. WILLIAM HOWE GILVIN - #58,743
no record of ever requesting or receiving

44. ARTHUR FREDERICK GOODE - #51,480 & 59,453
#51,480 - no request docketed but there is a letter of request dated 11/23/77; psychiatric exam received 12/9/77 and pulled from file on 9/17/80 and placed downstairs in vault in Mr. White's custody

#59,453 - no record of ever requesting or receiving

45. FREDDIE LEE HALL - #54,423 & 54,561
no record of ever requesting or receiving

46. LENSON A. HARGRAVE - #48,135
no record of ever requesting or receiving

47. WILLIAM LANAY HARVARD - #47,052
no record of ever requesting on docket sheet but there is a card in the file stating that the psychiatric exam was requested on 1/12/76; psychiatrist's exam received on 1/13/76 and psychological screening report received on 1/20/76 but there is nothing in the file now

48. ROBERT HEINEY - #56,778
no record of ever requesting or receiving

49. JAMES E. HITCHCOCK - #51,108
no record of ever requesting or receiving

50. MONROE HOLMES - #48,392
no request on docket sheet or in file; psychological screening report received on 6/8/76 and pulled from file on 10/29/80 and placed downstairs in vault in Mr. White's custody

51. CARL JACKSON - #48,165
no record of ever requesting or receiving; there are letters from psychologists to the trial judge dated 8/20/75 & 8/18/75 which was prior to sentencing which are still in the file

52. RONALD JACKSON - #47,269
no record of ever requesting or receiving

53. ELIGAAR ARDALLE JACOBS - #49,345
no record of ever requesting on docket sheet or in file; psychological screening report received on 11/29/76; classification & admission summary and psychological screening report pulled from file and placed downstairs in vault in Mr. White's custody on 10/9/80

54. BRYAN F. JENNINGS - #59,299
no record of ever requesting or receiving

55. WILLIAM RILEY JENT - #58,744
no record of ever requesting or receiving

56. MARVIN EDWIN JOHNSON - #56,167
no record of ever requesting or receiving

57. LESLIE R. JONES - #56,199
no record of ever requesting or receiving; post-sentence investigation was received 2/4/80 and removed from file on 10/15/80 and placed in vault downstairs in Mr. White's custody

58. AMOS LEE KING, JR. - #52,185
no record of ever requesting or receiving

59. RICHARD KING - #59,464
no record of ever requesting or receiving

60. THOMAS KNIGHT - #47,599
no record of ever requesting or receiving

61. JOHN WALLACE LeDUC - #47,953
no record of request or recept on docket; psychological screening report in file which was pulled on 10/28/80 and placed in vault downstairs in Mr. White's custody

62. ROBERT FIELDMORE LEWIS - #50,851
no record of ever requesting on docket sheet but there is a letter of request in file dated 8/4/77; psychological screening report received 8/29/77; letter from the Department of Offender Rehabilitation with a copy of a psychologist's letter dated 8/22/77 received 9/8/77; nothing in file

63. HAROLD GENE LUCAS - #51,135
no record of ever requesting on docket sheet but there is a letter of request dated 10/5/77; psychiatric evaluation received on 10/27/77 but not in file now; letter in file dated 10/2/76 which is psychiatric report but was ordered by the trial judge

64. BOBBY EARL LUSK - #59,146
no record of ever requesting or receiving

65. JOHN P. MAGGARD - #51,614
no record of ever requesting or receiving

66. PAUL EDWARD MAGILL - #51,699
requested by letter on 5/15/78 and psychological screening report received on 6/6/78; psychological screening report was returned to the Department of Offender Rehabilitation on 7/10/78; appellant filed Motion to Inspect and Copy Psychological Screening Report and Presentence Investigation Report on 6/21/78 which was granted and 6/23/78

67. NOLLIE LEE MARTIN - #55,716
no record of ever requesting or receiving

68. DOUGLAS RAY MEEKS - #47,533 & 48,080
#47,533 - no request docketed or in file; psychological report received on 3/30/76 and pulled from file on 9/17/80 and placed downstairs in vault in Mr. White's custody

#48,080 - no request docketed or in file; psychiatric exam reports received 3/31/76 and pulled from file on 9/17/80 and placed downstairs in vault in Mr. White's custody

69. ANTONIO MENENDEZ - #49,294
no record on docket of ever requesting but there is a letter in the file requesting dated 1/4/77; psychological screening report received on 1/10/77 but not in file now

70. CHARLES DWIGHT MESSER - #49,780
no record of ever requesting on docket sheet but there is a letter of request in file dated 3/30/77; psychiatric evaluation received on 4/19/77 but not in file now

71. MARK MIKENAS - #49,928
no record on docket sheet of requesting but there is a letter of request in the file dated 1/5/77; psychological screening report received 1/10/77 and pulled from file on 10/13/80 and placed downstairs in vault in Mr. White's custody

72. GREGORY MILLS - #59,140
no record of ever requesting or receiving

WINDFORD MINES - $50,996
no record of ever requesting or receiving; there is a Motion to Supplement the ...rd which has psychiatric ...tters attached to it which was denied by the Court but is sti... in the file

74. ELDRED LONNIE MOODY - $52,907
no record of ever requesting or receiving

75. FLOYD MORGAN - $54,939
no record of ever requesting or receiving; there is a psychologist's letter in the file dated 6/12/78 which is a defense exhibit

76. JAMES A. MORGAN - $53,418
no record of ever requesting or receiving

77. THOMAS McCAMPBELL - $57,026
no record of ever requesting or receiving

78. ROY McKENNON - $54,172
no record of ever requesting or receiving

79. EDDIE ODOM - $50,575
no record of ever requesting or receiving on docket sheet but there is a letter of request dated 1/24/77 in file; no report in file

80. TIMOTHY CHARLES PALMES - $52,045
no record of ever requesting or receiving; there are two psychiatric reports in the file which were ordered by the trial judge, one dated 12/22/76 and one dated 11/12/76

81. ANTHONY RAY PEEK - $54,226
no record of ever requesting or receiving

82. THOMAS PERRY - $57,142
no record of ever requesting or receiving

83. DONALD PERRY - $53,003
no record of ever requesting or receiving

84. JAMES LEROY PHIPPEN - $54,664
no record of ever requesting or receiving

85. RALEIGH PORTER - $55,841
no record of ever requesting or receiving; there was a post-sentence investigation which investigation attached behind the pre-sentence investigation which was pulled from file on 10/10/80 and placed downstairs in vault in Mr. White's custody

86. CHARLES WILLIAM PROFFITT - $45,541
no record of ever requesting or receiving

87. TOMMY LEE RANDOLPH - $54,869
no record of ever requesting or receiving

88. JAMES DAVID RAULERSON - $47,991
no record of ever requesting or receiving

89. WARDELL RILEY - $49,666
no record of ever requesting or receiving

90. JAMES FRANKLIN ROSE - $51,724
no record of ever requesting or receiving

91. MACK RUFFIN, JR. - $55,684
no record of ever requesting or receiving

92. JESSE RAYMOND RUTLEDGE - $48,801
no request docketed but there is a letter of request dated 4/21/77; the only psychiatric reports in the file were ordered by the trial judge and were done prior to sentencing

93. MICHAEL SALVATORE - $48,513
no record of request; psychological screening report received 4/14/76; pulled from file on 9/17/80 and placed downstairs in vault in Mr. White's custody

94. LEON SCOTT - $56,419
no record of ever requesting or receiving

95. PAUL WILLIAM SCOTT - $58,588
no record of ever requesting or receiving

96. CARL ELSON SERINER - $51,749
no request docketed or in file; the only psychological screening report in the file is attached behind the trial judge's response to the Gardner order which was done prior to sentencing

97. WILLIE CLAYTON SIMPSON - $49,681
no record of ever requesting or receiving

98. TERRY MELVIN SIMS - $57,510
no record of ever requesting or receiving

99. HENRY PERRY SIRECI, JR. - $50,905
no record of ever requesting or receiving

100. FRANK SMITH - $57,743
no record of ever requesting or receiving; post-sentence investigation was received on 8/21/80 and returned to the Offender Intake and Investigation Program Administrator of the Department of Corrections on 8/25/80

101. JIMMIE LEE SMITH - $55,961
no record of ever requesting or receiving; supplemental record received 5/23/79 containing psychological report removed from file 10/13/80 and placed in vault downstairs in Mr. White's custody

102. CARL RAY SONGER - $45,584 & 52,642
$45,584 - no record of ever requesting or receiving

$52,642 - no record of request on docket but there is a letter of request dated 12/21/77 but no evaluation was received; post-sentence investigation received 1/23/78 and returned 5/9/78 to the Parole and Probation Commission

103. JOSEPH ROBERT SPAZIANO - $50,250
no record of ever requesting or receiving

104. WALTER GALE STEINHORST - $55,087
no record of ever requesting or receiving

105. RUFUS EUGENE STEVENS - $57,738
no record of ever requesting or receiving; there is a psychiatric evaluation attached behind the pre-sentence investigation which was ordered by the trial judge and done on 6/8/79

106. ROY ALLEN STEWART - $57,971
no record of ever requesting or receiving

107. RAYMOND R. STONE - $48,275
no record of request on docket or in file; psychological screening report received 5/19/76 according to docket but not in file now; there are psychiatric reports in file which were done prior to sentencing and which are exhibits

108. RONALD J. STRAIGHT - $52,460
no record of ever requesting or receiving

109. MERLE RICHARD STURDIVAN - $59,416
no record of ever requesting or receiving

110. ROBERT AUSTIN SULLIVAN - $44,750
no record of ever requesting or receiving

111. JESSIE JOSEPH TAVERO - #49,935
no record of ever requesting or receiving

112. DANIEL MORRIS THOMAS - #51,692 & 51,927
#51,692 - no record of request on docket but there is a letter of request dated 9/22/77; no record of ever receiving evaluation

#51,927 - letter requesting psychiatric evaulation docketed and in file on 1/24/78; psychiatric contact note received 2/1/78 and it was pulled from file on 9/17/80 and placed downstairs in vault in Mr. White's custody

113. WILLIAM LEE THOMPSON - #55,697
no record of ever requesting or receiving

114. GARY HENRY TRAWICK - #57,077
no record of ever requesting or receiving

115. MANUEL VALLE - #54,572
no record of ever requesting or receiving

116. CHARLES MALLORY VAUGHT, JR. - #52,835
no record of ever requesting or receiving

117. DONALD ALBERT WALSH - #59,512
no record of ever requesting or receiving

118. DAVID LEROY WASHINGTON - #50,832; 50,833 & 50,850
no record of ever requesting or receiving

119. SOLOMON WEBB - #58,306
no record of ever requesting or receiving

120. WILLIAM GLENN WELTY - #55,497
no record of ever requesting or receiving

121. BEAUFORD WHITE - #54,292
no record of ever requesting or receiving

122. WILLIAM MELVIN WHITE - #55,875
no record of ever requesting or receiving

123. JOHNNY PAUL WITT - #45,796 & 58,329
no record of ever requesting or receiving

CERTIFICATE OF SERVICE

I, Peter Buscemi, hereby certify that copies of the foregoing pleading and accompanying exhibits have been served upon the plaintiff State of Florida by depositing copies of same in the United States Mail, with proper first-class postage attached hereto, addressed as follows:

Jim Smith, Esquire
Attorney General,
State of Florida
The Capitol
Tallahassee, Florida 32301

and to:

Don T. Wilcox, Esquire
Assistant State Attorney
Tenth Judical Circuit
~~Wauchula~~ Bartow, Florida ~~33873~~

and hand-delivered to:
Michael Palecki, Esq.
Assistant Attorney General
Park Trammel Bldg
1313 Tampa Street
Tampa, Fla 33602

This the 22nd day of March, 1982.

P. B. Buscemi

PETER BUSCEMI
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 822-1843

ATTORNEY FOR DEFENDANT

APPENDIX H

Florida Statutes (1977)
Section 782.04 Murder

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in § 775.082, § 775.083, or § 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in § 775.082, § 775.083, or § 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.-084.

Florida Statutes (1982 Supp.)
Section 782.04 Murder

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

Amended by Laws 1976, c. 76-141, § 1, eff. June 15, 1976; Laws 1979, c. 79-400, § 290, eff. Aug. 5, 1979.

[See main volume for text of (1)(b) and (2)]

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statutes (1977)
Section 775.082 Penalties

775.082 Penalties

(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

* * * * *

Florida Statutes (1982 Supp.)
Section 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, eff. Dec. 8, 1972. Amended by Laws 1974, c. 74-379, § 1, eff. Oct. 1, 1974; Laws 1977, c. 77-104, § 248, eff. Aug. 2, 1977; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1979, c. 79-353, § 1, eff. July 3, 1979.

Laws 1972, c. 72-724, § 9, substantially rewrote this section.

Laws 1974, c. 74-379, § 1 added the third sentence to subsec. (

Laws 1977, c. 77-104, a reviser's bill corrected errors and deleted obsolete or expired provisions. See Reviser's Note—1977.

Laws 1977, c. 77-174, a reviser's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

Laws 1979, c. 79-353, substituted in the fifth sentence of subsec. (1) "to the nature of the crime and the character of the defendant" for "to sentence", deleted in subsecs. (2)(b) and (3)(b) "as enumerated in subsection (6)", and added subsec. (5)(i).

this. Our proposition to you is very simple. Earl Enmund participated no more than perhaps suggesting a robbery and in driving to the Kerseys', and in thereafter driving back. But there was never any proof by any investigation by anybody involved, offered, tendered or accepted by the Jury that he was actually involved in any type of this situation more than possibly suggesting to or even perhaps driving to the Kerseys' for purposes of robbery.

For that reason I humbly suggest and wish that the Jury would take that into consideration and recommend mercy for Earl Enmund.

THE COURT: Anything further from either one of the Defendants?

From the State?

MR. WILCOX: No, your Honor.

THE COURT: All right.

Ladies and gentlemen of the Jury, once again, you know what your responsibility today is at this portion of the trial. You are serving now as advisors to the Court and as advisors to the Court it will be your responsibility to make a recommendation. But the Court has the final discretion, responsibility, in this matter, and I have the power of independent judgment. Under these procedures, therefore, it is now your duty and responsibility to determine by a majority vote whether or not you advise

the imposition of the death penalty based upon, one, whether sufficient aggravating circumstances as hereafter enumerated exist to justify the death penalty; two, whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist; and, thirdly, based upon these considerations, whether the Defendants should be sentenced to life or death.

Aggravating circumstances are limited by statute to the following:

(A) The capital felony was committed by a person under sentence of imprisonment.

(B) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(C) The defendant knowingly created a great risk of death to many persons.

(D) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy or the unlawful throwing or placing or discharging of a destructive device or bomb.

(E) The capital felony was committed for

the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(F) The capital felony was committed for pecuniary--again, that means for money--or other valuable consideration.

(G) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(H) The capital felony was especially heinous, atrocious or cruel.

Mitigating circumstances by Statute are:

(A) The defendant has no significant history of prior criminal activity.

(B) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(C) The victim was a participant in the defendant's conduct or consented to the act.

(D) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(E) The defendant acted under extreme duress or under the substantial domination of another person.

(F) Capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct

to the requirements of law was substantially impaired. And,

(C) The age of the defendant at the time of the crime.

Now, your determination and recommendation must be made objectively as it relates to each Defendant without bias or prejudice either for or against the State or for or against either one of these Defendants.

Now, you will have two forms of verdict as to each count and as to each Defendant. There are two counts of first degree murder. Your advisory sentence as to Count One, and this will be the one as it relates to Earl Enmund: We, the Jury, have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the Court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances defined by the Court's charge do outweigh such aggravating circumstances, and we do find and advise that the aggravating circumstances do outweigh the mitigating circumstances. A majority of at least seven of us, therefore, advise the Court that the death penalty should be imposed herein upon the Defendant by the Court as to Count One.

Then, as to each count, you have the reverse,

whether at least five--excuse me--at least seven of you find that the mitigating circumstances outweigh the aggravating circumstances.

All right. Members of the Jury, first of all, before you retire, are there any objections or corrections to the Court's instructions from the State?

MR. WILCOX: No, your Honor.

THE COURT: From Defendant Sampson Armstrong?

MR. ANDERSON: Yes, your Honor. I have one objection and correction.

I think when you were listing the mitigating circumstances, Subparagraph (A), you read the defendant has no subsequent history or no criminal activity. I think it should have been instead of or.

MR. WILCOX: I heard the same thing Mr. Anderson did.

MR. ANDERSON: I am sure it is just a mistake.

THE COURT: All right. Let me read it again.

The defendant has no significant history of prior criminal activity.

Anything further, Mr. Anderson?

MR. ANDERSON: No, sir, nothing further.

THE COURT: Any further objection, Mr.

Trombley?

MR. TROMBLEY: No objection.

THE COURT: Members of the Jury, you may now retire.

(Thereupon at or about 9:31 o'clock p.m. the Jury retired from the courtroom.)

THE COURT: Madam Court Reporter, you are to transcribe the Court's charge on this sentencing procedure of the trial and file those in the official records of this Court.

We will be in recess until the Jury returns.

(Thereupon a short recess was taken, after which with all parties present, at or about 10:02 o'clock p.m., the Jury returned to the courtroom.)

THE COURT: Bring the Jury in.

(Thereupon the Jury returned to the courtroom.)

THE COURT: Be seated, please.

Mr. Shackleford, have you reached your advisory verdicts?

MR. SHACKLEFORD: We have, your Honor.

THE COURT: Would you deliver those to the

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